TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 15, 1954

CERTIORARI GRANTED MARCH 8, 1954

No. 13502

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

RAY BROOKS,

Appellee.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX

APPEARANCES

A. NORMAN SOMERS,
Assistant General Counsel, N.L.R.B.,
Washington, D.C.,
For Petitioner.

CARTER & POTRUCH, by
FREDERICK A. POTRUCH,
610 So. Broadway,
Los Angeles, Calif.,
For Respondent.

United States of America, Before the National Labor Relations Board, Twenty-first Region

Case No. 21-CA-1117

In the Matter of
RAY BROOKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS FOR ITS DISTRICT LODGE No. 727

COMPLAINT

* * *

1.

The Respondent, at all times material herein, has engaged in and is engaging in the operation of an automobile agency dealership and repair shop in Van Nuys, California, under a franchise for the sale and distribution of new Chrysler and Plymouth motor cars, trucks and parts under an agreement with the Chrysler Corporation.

* * *

6.

The International Association of Machinists, District Lodge No. 727, was certified by the National Labor Relations Board on April 20, 1951, as the representative of the employees of Respondent in an appropriate unit as follows:

> All employees of the Company who were in the employ of the Employer during the payroll period ending March 24, 1951, excluding

all salesmen, office and clerical employees, watchmen, guards, professional employees and supervisors, as defined in the National Labor Relations Act, as amended.

* * *

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-first Region, this 30th day of July, 1951, issues this Complaint against Ray Brooks, Respondent herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board,
Twenty-first Region.

[Admitted in evidence as General Counsel's Exhibit No. 1-C, October 8, 1951.]

Before the National Labor Relations Board

[Title of Cause.]

ANSWER

Comes Now Ray Brooks, respondent in the above-entitled matter, and answering the complaint on file herein, admits, denies and alleges as follows:

I.

Respondent Ray Brooks denies generally and specifically all allegations in Paragraphs numbered II, IV, V, VII, VIII, IX, X, XI and XII.

II.

In answer to Paragraph I, Respondent Ray Brooks admits all the allegations contained therein, saving the allegation with respect to the dealership of trucks.

III.

Answering Paragraph III, Respondent Ray Brooks admits that he obtains new Chrysler and Plymouth motor cars in the conduct of his business, but denies generally and specifically each and every other allegation contained therein.

IV.

As a statement of fact as required by Section 203.20 of the National Labor Relations Board Rules and Regulations, Series 5, as amended, Respondent Ray Brooks alleges that he has not bargained with the union because the men employed in Respondent's shop have revoked the union's authority to represent them in any and all negotiations with Respondent.

Wherefore, Respondent Ray Brooks prays that the complaint be dismissed and for such other and further relief as to the Board seems just and meet in the premises.

/s/ RAY BROOKS,
Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Admitted in evidence as General Counsel's Exhibit No. 1-F, October 10, 1951.]

Before the National Labor Relations Board

[Title of Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

The General Counsel of the National Labor Relations Board issued a complaint dated July 20, 1951, based upon a charge duly filed on May 29, 1951, by International Association of Machinists, District Lodge No. 727, herein called the Union, against Ray Brooks, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, complaint, and notice of hearing thereon were duly served upon Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged that Respondent, on and after April 21, 1951, had (1) refused on request to bargain with the Union as the duly certified representative of a majority of his employees in an appropriate unit and (2) interfered with, restrained, and coerced his employees by (a) attempting to influence them against the Union and (b) threatening to withdraw rights and privileges enjoyed by the employees prior to the certification of the Union on April 20, 1951. Respondent's answer alleged that

his employees had revoked the authority of the Union to represent them and denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on October 8 and 9, 1951, at Los Angeles, California, before the undersigned Trial Examiner, Martin S. Bennett. The General Counsel and Respondent were represented by counsel and the Union by its representatives. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the hearing, Respondent moved that the allegations of the complaint be dismissed; the undersigned denied that portion of the motion relating to the alleged refusal to bargain and reserved ruling on that portion relating to the alleged interference, restraint, and coercion. The latter is disposed of by the findings hereinafter made. The parties were afforded an opportunity to present oral argument and to submit briefs and/or proposed findings and conclusions to the undersigned. The General Counsel presented oral argument and a brief has been received from Respondent.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I.

The Business of Respondent

Ray Brooks, an individual doing business under that name, is a dealer franchised by the Chrysler

Corporation who is engaged in the sale of new Chrysler and Plymouth automobiles at Van Nuys, California. During the year 1950, Respondent purchased and sold within the State of California new automobiles valued in excess of $400,000. These automobiles were assembled within the State of California by the manufacturer from parts of which approximately fifty per cent were manufactured in States of the United States other than the State of California and shipped to that State for assembly there. The undersigned finds that Respondent is engaged in commerce within the meaning of the Act. N.L.R.B. v. Townsend, 185 F. 2d 378 (C.A. 9), cert. denied 341 U.S. 909; Howell Chevrolet, 95 N.L.R.B. No. 62, and Baxter Brothers, 91 N.L.R.B. 1480.

II.

The Labor Organization Involved

International Association of Machinists, District Lodge No. 727, is a labor organization admitting to membership employees of Respondent.

III.

The Unfair Labor Practices

A. The Refusal to Bargain

1. Introduction; the Representation Case

Presented for decision herein are the issues of whether Respondent has refused to bargain collectively with the Union subsequent to the certification of the latter as the result of a Board-conducted

election, and whether, after said election, Respondent interfered with, restrained, and coerced its employees by threatening to deprive them of privileges previously enjoyed. As stated, Respondent's defense to the claimed refusal to bargain is that the employees in the unit have revoked the authority of the Union to represent them, thereby allegedly destroying the representative status claimed by the Union.

The history of the representation proceeding is as follows: Respondent and the Union entered into a consent election agreement on March 27, 1951, in Case No. 21-RC-1868. The election was duly held on April 12, 1951, with all 15 eligibles voting. Two ballots were challenged on the ground that they had been cast by supervisory employees; the challenges have not been resolved. Of the 13 valid votes counted, 8 were cast for the Union and 5 against. No objections to the election were filed and the Union was duly certified on April 20, 1951, by the Regional Director for the Twenty-first Region, as the representative of the employees of Respondent.

2. The Appropriate Unit

The complaint alleges that the unit agreed upon by the parties to the consent election agreement, including all employees of Respondent, but excluding salesmen, guards, professionals, and supervisors, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The undersigned finds that the above-described unit, the appropriateness of which Respondent does not dispute herein, constitutes a

unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Representation by the Union of a Majority in the Appropriate Unit

As stated, the Union was duly certified on April 20, 1951, after winning the election held on April 12, as the exclusive representative for the purposes of collective bargaining of the employees in the above-described appropriate unit. Despite such certification, and the great weight uniformly attributed thereto, Respondent contends that the Union is no longer entitled to the benefits of this representative status, placing reliance on a document introduced in evidence herein. This document, consisting of one page in longhand, was received in the mail by Respondent on April 19, one week after the Union won the election and one day before the certification issued; a copy was also received by the Union at the same time.[1] The document bears the purported signatures of nine of the 13 employees of Respondent who cast valid ballots in the election and reads as follows:

> We, the undersigned majority of the employees of Ray Brooks, Chrysler-Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a barganing (sic) agent. We respectfully submit this petition for your consideration.

[1] As will appear, the Union requested and Respondent refused a meeting after receipt of this document.

Respondent argues that this document constitutes a repudiation of the Union by a majority of those in the unit and that as a result the Union has lost its representative status acquired in the election of April 12, 1951; reliance is placed upon the decision in N.L.R.B. v. Vulcan Forging Co., 188 F. 2d 927 (C.A. 6).

The undersigned is of the belief that this argument must be resolved adversely to Respondent. Despite the cited decision, Board law and the great weight of court law adopt a contrary view. The policy of issuing a certificate as bargaining representative after an election conducted by the Board is based upon the desirable safeguard of a secret ballot under governmental authority free from all influence, thus obtaining the most reliable indication of the employee concerning his true views relative to union representation and collective bargaining. The statute, if a labor organization has been selected by a majority of the employees, then proceeds to bind the employees to their choice for a reasonable period, normally one year. N.L.R.B. v. Geraldine Novelty Co., 173 F. 2d 14 (C.A. 2). A contrary view, not stabilizing the issue in this fashion, would create the very "litigous bedlam and judicial chaos" intended to be avoided by these salutary principles which imbue a certification with a reasonable amount of permanence. N.L.R.B. v. Appalachian Electric Power Co., 140 F. 2d 385 (C.A. 4). See N.L.R.B. v. Worcester Woolen Mills Corp., 170 F. 2d 13 (C.A. 1), cert. denied 336 U.S. 903 and

N.L.R.B. v. Prudential Insurance Co., 154 F. 2d 385 (C.A. 6).

This principle recognizes the inevitability in a democratic plan of employee representation of subordinating for a period of time any shifts in employee sentiment in favor of a reasonable period of stability in employer-employee relations. This view is recognized and discussed in N.L.R.B. v. Century Oxford Mfg. Corp., 140 F. 2d 541 (C.A. 2), cert. denied 323 U.S. 714, where the Court stated as follows:

> The purpose of the Act is to insure collective representation for employees, and to that end section 9 gives power to the Board to supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results; freedom to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under the proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees.

The foregoing views of the courts, approving Board policy, are only strengthened when attention

is given to the legislative history of the amendments to the Act in 1947. The Board's one-year certification rule was one of long standing and was presumably well known to Congress prior to the changes in the Act. See N.L.R.B. Twelfth Annual Report, 1947. and N.L.R.B. Eleventh Annual Report, 1946. Moreover, Section 9 (c) (3) of the amended Act proscribes the holding of more than one valid election in an appropriate unit during a 12-month period; this is tantamount to approval and adoption of the Board's one-year certification rule.

As stated by Senator Taft, "The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continued elections. The men choose a bargaining agent for one year. He remains the bargaining agent until the end of that year" (93 Cong. Rec. 3838).

The Senate reports reflect a similar view. As stated in one,

> In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot . . . elections in any given unit may not be held more frequently than once a year.
>
> * * *
>
> This amendment prevents the Board from holding elections more often than once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having re-

> ceived a majority. At present, if the Union loses, it may on presentation of additional membership cards secure another election within a short time, but if it wins its majority cannot be challenged for a year (S. Rep. No. 105, 80th Cong., 1st Sess. 12, 25).

The desirability of this rule was expressly recognized by the courts in decisions handed down after the passage of the 1947 amendments. N.L.R.B. v. Worcester Woolen Mills, supra, and N.L.R.B. v. Geraldine Novelty Co., supra. Thus, applying these controlling views to the instant proceeding, it becomes apparent that they involve the application of a single rather than a double standard, as adherence to Respondent's contention herein would require. If the Union, or any union, had lost the election, it would then be precluded from achieving a representative status as a certified bargaining representative for 12 months. By the same token, if the employees, in the secrecy of the voting booth, and free from any outside interference, vote in favor of and select the Union as their bargaining agent, this selection, as Board policy recognizes, should last for an identical period, at least 12 months. Majure Transport Co., 95 N.L.R.B. No. 43. Employees can scarcely be impressed with the solemnity of a choice which they are permitted to forthwith repudiate.

Still another basic consideration is, in the view of the undersigned, controlling herein. Respondent has placed reliance, in disputing the union majority,

on a document received in the mail which bears the names of nine employees as purported signers thereof. No evidence was offered that the nine employees whose names appear thereon had actually affixed their signatures thereto and none was offered with respect to any of the circumstances of the preparation or signing of the document. The record discloses no evidence that Respondent made a comparison of these signatures with those of the named employees which it presumably has on its payroll records. Not only were none of the nine called as witnesses by Respondent, but furthermore, when one of the nine, Verner Emrick, testified herein as a witness for the General Counsel, he was not questioned by Respondent concerning his purported signature on the document which was later introduced in evidence by Respondent.

In sum, there has been a failure to prove that the document merits the weight which Respondent would attribute to it.[2] There is no evidence concerning the circumstances of the signing, or as to who actually affixed the signatures. By way of significant contrast, in a proceeding where the General Counsel desires to prove a union majority on the basis of union designation cards, rather than a certification, he is generally required to have the signature on each card identified by the signer or by one who saw the card signed by the signer. Schramm and Schmieg Co., 67 N.L.R.B. 980, and

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[2]The document was received in evidence solely as a document which Respondent received in the mail on April 19, 1951.

The Warren Co., 90 N.L.R.B. 689. Similar evidence of an authenticating nature is totally lacking here, and to attribute to this document the weight urged by respondent would again mean the application of a double standard. This serves only to highlight the reasonableness of the Board's policy in attributing such great weight to the desires of the employees when expressed in the privacy of the voting booth.

In view of the foregoing, the undersigned rejects Respondent's contention herein and finds that on April 12, 1951, and at all times thereafter, the Union, by virtue of Section 9 (a) of the Act, was and now is the duly designated representative of a majority of the employees in the above-described appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

4. The Refusal to Bargain

After the Union was duly certified on April 20, 1951, Representative D. A. Gordon addressed a letter to Respondent on April 27. He directed attention to the certification, asked for a meeting for the purpose of negotiating a contract covering Respondent's employees and requested a reply. On May 1, Respondent's counsel replied for Respondent. The reply stated that Respondent had "been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it." The letter further stated that in a recent decision, the Court of Appeals for the Sixth Circuit, in analo-

gous circumstances, had held it improper to compel employees to be represented by a repudiated labor organization; in conclusion, the letter stated that it would "be wiser to defer consideration of the proposed negotiations until such time as it might appear that the employees desire to have your union represent them." There is no evidence of any other communications between the parties.

As is apparent, there has been a refusal by Respondent to recognize the Union and negotiate a contract. This position is predicated on Respondent's rejection of and failure to honor the certification of the Union. However, this precise contention has hereinabove been decided adversely to Respondent. Accordingly, the undersigned finds that, on May 1, 1951, and at all times thereafter, Respondent has refused to bargain collectively with the Union and has thereby interfered with, restrained, coerced its employees in the exercise of the rights guaranteed by the Act.

5. Alleged Interference, Restraint, and Coercion

In support of this allegation, the General Counsel offered evidence of two incidents. Three employees, Emrick, Callucci, and White testified concerning a talk made by Ray Brooks to the employees soon after it was learned that the Union had won the election. The versions of Emrick and Cellucci reflect nothing more than surprise and disappointment on the part of Brooks, expressed graphically, over the results of the election and an announcement that in the future, matters affecting working conditions

were to be handled through the union representative. White's version is similar, but he also attributed to Brooks the statement that Brooks would be unable to advance money and grant certain privileges (unspecified) to the employees as in the past.

Emrick also testified concerning a statement allegedly made to him by Shop Foreman Jennings. Emrick regularly rode to work with Jennings and the latter's wife. On one such occasion, Jennings was speaking to his wife who was also in the front seat. Emrick, in the rear, allegedly heard Jennings state that he would not work in a shop which a union had organized and that the employees of Respondent would be denied the existing privilege of working on their own cars (presumably in the event of union organization). Emrick, a vague witness, placed this talk as occurring either shortly before or shortly after the election. Brooks and Jennings did not testify herein.

In view of both the quality and quantity of the evidence presented herein, the undersigned is of the belief and concludes that the record does not warrant and will not support a finding of interference, restraint, and coercion based on the foregoing matters. It will be recommended that this allegation be dismissed.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III above, occurring in connection with his business

operations described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that he cease and desist therefrom and that he take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Association of Machinists, District Lodge No. 727, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All employees of Respondent at his place of business at Van Nuys, California, excluding salesmen, guards, professionals, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. International Association of Machinists, District Lodge No. 727, was on April 12, 1951, and at all times thereafter has been and is, the exclusive representative of all employees in the aforesaid ap-

propriate unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on May 1, 1951, and at all times thereafter, to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of his employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

7. Respondent has not engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act by threatening to deprive his employees of rights and privileges enjoyed prior to certification of the Union.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that Respondent, Ray Brooks, Van Nuys, California, his agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all his employees, excluding salesmen, guards, professionals, and supervisors;

(b) In any manner interfering with the efforts of International Association of Machinists, District Lodge No. 727, to bargain collectively with him in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District No. 727, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at his place of business at Van Nuys, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by him for a period of sixty (60) consecutive days in conspicuous places, including all places where

notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps Respondent has taken to comply herewith.

It is also recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, Respondent notifies the aforesaid Regional Director in writing that he will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

It is further recommended that the complaint be dismissed insofar as it alleges that Respondent has interfered with, restrained, and coerced his employees by threatening to deprive them of rights and privileges enjoyed prior to the certification of the Union.

Dated this 29th day of October, 1951.

/s/ MARTIN S. BENNETT,
Trial Examiner.

Appendix A

Notice to All Employees
Pursuant to
The Recommendations of a Trial Examiner
of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Bargain collectively upon request with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all employees in the bargaining unit described herein with respect to rate of pay, wages, hours, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees of Ray Brooks, Van Nuys, California, but excluding salesmen, guards, professionals, and supervisors.

We Will Not in any manner interfere with the efforts of the above-named union to bargain collectively with us, or refuse to bargain with said union as the exclusive representative of the employees in the bargaining unit set forth above.

Dated.....

RAY BROOKS,
(Employer)

By.....,
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-1117

In the Matter of:
RAY BROOKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS FOR ITS DISTRICT LODGE No. 727

DECISION AND ORDER

On October 29, 1951, Trial Examiner Martin S. Bennett issued his Intermediate Report in this proceeding, finding that the Respondent had engaged in and was engaging in conduct violative of Sections 8 (a) (1) and 8 (a) (5) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other violations of Section 8 (a) (1) alleged in the complaint, and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.

The Board[1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no

[1]Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ray Brooks, Van Nuys, California, his agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all his employees, excluding salesmen, guards, professionals, and supervisors;

(b) In any manner interfering with the efforts

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[2]In its brief, the Respondent contends that the Board is without jurisdiction in this matter because there is no allegation or proof that the charging union is in compliance with Section 9 (f) (g) and (h). We find no merit in this contention. The Act does not, as a condition to the exercise of its jurisdiction, require pleading and proof by the Board that the Union has complied with these requirements. N.L.R.B. v. Greensboro Coca-Cola Co., 180 F. 2d 840 (C.A. 4); N.L.R.B. v. Red Rock Co., 187 F. 2d 76 (C.A. 5). Moreover, we have administratively determined that the filing requirements of Section 9 (f) (g) and (h) of the Act were fully satisfied at all relevant times in this case.

of International Association of Machinists, District Lodge No. 727, to bargain collectively with him in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District No. 727, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at his place of business at Van Nuys, California, copies of the notice attached to the Intermediate Report and marked "Appendix A."[3] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by him for a

[3]This notice, however, shall be, and it hereby is, amended by striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu there of the words "A Decision and Order." In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

period of sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps Respondent has taken to comply herewith.

Signed at Washington, D.C., April 1, 1952.

[Seal] NATIONAL LABOR RELATIONS BOARD,

PAUL M. HERZOG,
Chairman,

JOHN M. HOUSTON,
Member,

PAUL L. STYLES,
Member.

Before the National Labor Relations Board
Twenty-first Region

Case No. 21-CA-1117

In the Matter of:
RAY BROOKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS for its District Lodge No. 727.

PROCEEDINGS

Monday, October 8, 1951.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Martin S. Bennett, Trial Examiner.

Appearances:

JAMES W. CHERRY, JR.,
Appearing on Behalf of the General Counsel of the National Labor Relations Board.

CARTER & POTRUCH, by
FREDERICK A. POTRUCH, and
JAMES M. NICOSON,
Appearing on Behalf of Respondent.

E. M. SKAGEN and
WALTER OWEN,
Appearing on Behalf of International Association of Machinists, for its District Lodge No. 727, and the Research Department, Machinists Building, Washington, D. C.

* * *

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification, were received in evidence.)

* * *

Mr. Cherry: I have had some discussion with Mr. Nicoson off the record concerning a possible stipulation of commerce [5*] facts, and I would like to propose at this time a stipulation that Ray Brooks, an individual, doing business as Ray Brooks, a Chrysler-Plymouth dealer, operating with a franchise from the Chrysler Corporation, doing business in Van Nuys, California, during the last fiscal year, or, rather, calendar year, purchased in excess of $400,000.00 of automobiles from the Chrysler Corporation. All of these cars were purchased locally and assembled locally, and substantially all of them were sold locally.

Mr. Nicoson: All of them; not substantially. It was all of them.

Mr. Cherry: All of them were sold locally. It is further stipulated that approximately 50 per cent of the parts going into the cars were manufactured and shipped into the state from outside the State of California.

It is further stipulated that the Chrysler Corporation is engaged in business in all the states of the Union.

Mr. Nicoson: Just for the sake of being accurate, we better say that Chrysler Corporation oper-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ates businesses in other states, other than the State of California.

Mr. Cherry: I will accept that as an amendment.

Mr. Nicoson: We will stipulate to that.

Mr. Skagen: So stipulated.

Trial Examiner Bennett: So stipulated. Do I understand that the current nature of the respondent's business is [6] similar to its business during 1950?

Mr. Nicoson: Yes. Your Honor, I should also point out that in reaching this stipulation on the facts we do not concede, however, that Ray Brooks is engaged in business affecting commerce or within the jurisdiction of the National Labor Relations Act or Board.

Trial Examiner Bennett: Yes. Your Answer sets forth that. I also thought that respondent's Answer denies that the charging union is a labor organization.

Mr. Nicoson: We might permit that, your Honor.

Mr. Cherry: Can we so stipulate?

Mr. Nicoson: We will stipulate to that.

Mr. Cherry: That the charging union is a labor organization within the meaning of the Act?

Mr. Nicoson: So stipulated.

Trial Examiner Bennett: So stipulated. [7]

* * *

(The documents heretofore marked General Counsel's Exhibits Nos. 2, 3, and 4 for identification were received in evidence.) [9]

* * *

GENERAL COUNSEL'S EXHIBIT No. 2

United States of America
National Labor Relations Board

Agreement for Consent Election

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and agree that an election by secret ballot is to be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine the proposition checked below. (Check appropriate box.)

☐ Representation Election: Whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s).

☐ Union Shop Election: Whether or not such employees desire to authorize the undersigned Union, which is their present collective bargaining representative, to make an agreement with the undersigned Employer requiring membership in such Union as a condition of continued employment.

The Parties Hereby Further Agree as Follows:

1. Election—Such election shall be held in accordance with the National Labor Relations Act,

General Counsel's Exhibit No. 2—(Continued)

the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

2. Eligible Voters—The eligible voters shall be those employees included within the Unit described below, who appear on the Employer's pay roll for the period indicated below, including employees who did not work during said pay roll period because they were ill or on vacation or temporarily laid off, and employees in the Armed Forces of the United States who present themselves in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Direc-

General Counsel's Exhibit No. 2—(Continued)

tor, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. Tally of Ballots—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of representatives or certificate of results of election, as may be indicated.

6. Objections, Challenges, Reports Thereon—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report

General Counsel's Exhibit No. 2—(Continued)

include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. Run-Off Procedure—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with Section 203.62 of the Board's Rules and Regulations.

(Copy)

8. Commerce—The Employer is engaged in commerce within the meaning of Section 2 (6) (7) of the National Labor Relations Act.

9. Wording on the Ballot—Only the choice below marked "X" is pertinent to this agreement.

Representation Election:

☒ In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

General Counsel's Exhibit No. 2—(Continued)

First .....

Second .....

Third .....

Fourth .....

Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No"

Union Shop Election:

☐ Do you wish to authorize the union which is your present collective bargaining representative to enter into an agreement with your employer which requires membership in such union as a condition of continued employment?

10. Pay Roll Period for Eligibility—
March 24, 1951.

11. Date, Hours, and Place of Election—
Date: April 12, 1951.
Hours: 9:30 a.m. to 10:00 a.m.
Place: Company's plant.

12. The Appropriate Collective Bargaining Unit—
Included: All employees of the Company.
Excluded: All salesmen, office and clerical employees, watchmen, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 727,
(Petitioner)

By /s/ E. M. SKAGEN,
Grand Lodge Representative.

General Counsel's Exhibit No. 2—(Continued)

RAY BROOKS,
(Employer)

By /s/ FREDERICK A. POTRUCH.

Date executed: 3/27/51.

Recommended:

/s/ LEO J. KLOOS, JR.,
Field Examiner, National
Labor Relations Board.

Date approved: 3/28/51.

/s/ HOWARD F. LeBARON,
Regional Director, National
Labor Relations Board.

Case No. 21-RC-1868.

Admitted in evidence October 8, 1951.

GENERAL COUNSEL'S EXHIBIT No. 3

United States of America
National Labor Relations Board

(Copy)

Case No. 21-RC-1868

In the Matter of:
RAY BROOKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 727.

Date Issued: April 12, 1951.

Type of Election (Check one):

- [X] Consent
- [ ] Stipulated
- [ ] Board ordered

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters. 15
2. Void ballots .....
3. Votes cast for International Association of Machinists, District Lodge 727..... 8
4. Votes cast for .....
5. Votes cast for .....

6. Votes cast against participating labor organization(s) 5
7. Valid votes counted (sum of 3, 4, 5, and 6) 13
8. Challenged ballots 2
9. Valid votes counted plus challenged ballots (sum of 7 and 8)..... 15
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes has been cast for International Association of Machinists, District Lodge 727.

For the Regional Director:

/s/ MAX STEINFELD.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For International Association of Machinists, District Lodge 727:

/s/ LEONARD A. WHITE.

For Ray Brooks:

/s/ W. C. REAGAN.

Admitted in evidence October 8, 1951.

GENERAL COUNSEL'S EXHIBIT No. 4

United States of America
National Labor Relations Board

(Copy)

Case No. 21-RC-1868

In the Matter of:
RAY BROOKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 727.

CERTIFICATION OF REPRESENTATIVES

Pursuant to the terms and provisions of the Agreement for Consent Election entered into by and between the parties in the above-entitled matter, the undersigned Regional Director of the National Labor Relations Board conducted an election by secret ballot as therein provided. No objections were filed to the Tally of Ballots furnished to the parties, or to the conduct of the election.

Pursuant to authority vested in the undersigned by Section 5 of the Agreement for Consent Election and by the National Labor Relations Board, it is hereby certified that a majority of the valid ballots has been cast for International Association of Machinists, District Lodge 727, and that pursuant to Section 9 (a) of the National Labor Relations Act said organization is the exclusive representative of all the employees in the unit defined in the

Agreement for Consent Election for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Los Angeles, Calif., this 20th day of April, 1951.

On Behalf of:

NATIONAL LABOR
RELATIONS BOARD,

/s/ HOWARD F. LeBARON,

Regional Director for 21st Region, National Labor Relations Board.

Admitted in evidence October 8, 1951.

Trial Examiner Bennett: They may be admitted.

(The documents heretofore marked General Counsel's Exhibits Nos. 5 and 6 for identification were received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 5

April 27, 1951.

Mr. Ray Brooks,
6530 Van Nuys Boulevard,
Van Nuys, California.

Dear Sir:

Pursuant to the terms and provisions of the National Labor Relations Board election and the Certification issued by the National Labor Relations Board on the 20th day of April, 1951, we are hereby

requesting a meeting for the purpose of negotiating a contract for your employees employed in the Production and Maintenance Departments of your shop, located at 6530 Van Nuys Blvd., Van Nuys, California.

We would like to hear from you at your earliest convenience.

Sincerely yours,

D. A. GORDON,
International Association of Machinists.

DAG:sl
cc: Roy M. Brown
John Snider

Admitted in evidence October 8, 1951.

GENERAL COUNSEL'S EXHIBIT No. 6

(Copy)

Law Offices of
Carter & Potruch
610 South Broadway
Los Angeles 14

May 1, 1951.

Mr. D. A. Gordon,
District Lodge 727, I.A.M.,
5501 Lankershim Boulevard,
North Hollywood, California.

Dear Mr. Gordon:

Re: Ray Brooks.

Your letter of April 21 addressed to Mr. Ray Brooks has been forwarded to us. Both Mr. Brooks

and we have been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it.

A recent decision of the United States Court of Appeals for the Sixth Circuit held in a similar situation that it would be improper to compel the employees to be represented by a discredited union and that to force them to bargain through a representative which they had repudiated would be depriving them of their rights to bargain through the representative of their choice.

Under the circumstances wouldn't it be wiser to defer consideration of the proposed negotiations until such time as it might appear that the employees desire to have your union represent them?

Sincerely yours,

/s/ FREDERICK A. POTRUCH.

JMN:gh

Admitted in evidence October 8, 1951.

Mr. Cherry: Mr. Emrick, please.

VERNER L. EMRICK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cherry:

Q. State your name, please.

A. Verner L. Emrick.

(Testimony of Verner L. Emrick.)

* * *

Q. Were you ever employed at the Chrysler-Plymouth plant, the dealer's place of Ray Brooks?

A. Yes, sir. [10]

* * *

Q. When did you first go to work, approximately, do you know?

A. Well, I went to work right after Paul Jennings did. That was the new service manager after Jack left.

Q. Was that early in the year of 1951?

A. That was early, I think about February.

Q. Were you at the plant at the time of the election? A. Yes.

Q. It was in April? A. Yes.

Q. Of 1951? A. I was.

Q. What kind of work were you doing?

A. I was the sweeper and a gardner, porter, and I guess that would be all. [11]

* * *

Mr. Nicoson: Your Honor, I have had marked for identification a document consisting of one page, and marked Respondent's Exhibit 1-A, with an envelope, which has been marked Respondent's Exhibit 1-B.

(Thereupon the documents above referred to were marked Respondent's Exhibits Nos. 1-A and 1-B for identification.)

Mr. Nicoson: I understand that it is stipulated

by General Counsel and myself that this document was received by the Ray Brooks Company in the United States registered mail on or about the date it bears, being April 18, 1951; is that correct?

Mr. Cherry: Yes.

Mr. Nicoson: With that understanding, I offer it as the document received by the respondent.

Mr. Cherry: I would so stipulate, that the document was received. I will not stipulate as to the authenticity of its signatures. But for that limited purpose I have no objection to it being admitted in evidence.

Mr. Nicoson: It is just to complete the record. Can we have a stipulation further that an identical copy of this, [58] with the signatures also as they appear here, was received by the National Labor Relations Board and also by the charging union?

Mr. Skagen: I will stipulate we received such a document, that the union received such a document. However, I will not stipulate as to the authenticity of any signatures or the accuracy of the document.

Mr. Cherry: I don't know whether a copy was actually sent to the Labor Board, but I have such a copy. I have no objection to it. I will so stipulate, that we have a copy of it and the union received a copy of it.

Trial Examiner Bennett: So stipulated. I gather there is no objection to its receipt in evidence.

Mr. Skagen: For the limited purpose, I have no objection.

Mr. Cherry: No.

Trial Examiner Bennett: It may be admitted, the envelope as well.

(The documents heretofore marked Respondent's Exhibits Nos. 1-A and 1-B for identification were received in evidence.)

RESPONDENT'S EXHIBIT No. 1-A

April 18, 1951.

We, the undersigned majority of the employees of Ray Brooks, Chrysler-Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent.

We respectfully submit this petition for your consideration.

/s/ MELVIN C. SOULSBURG,

/s/ MONTE C. BROWN,

/s/ FRANKLIN C. WINN,

/s/ WILLIE BRUCE,

/s/ VERNER L. EMRICK,

/s/ CHARLIE BRUCE,

/s/ GARTH BOYCE,

/s/ HAROLD AZBILL,

/s/ GEORGE MILLS.

Admitted in evidence October 8, 1951.

Mr. Skagen: For the record, this is the document with the date April 18, 1951, in the upper right-hand corner.

Trial Examiner Bennett: That is right. I notice, however, the envelope bears post office mark of April 19th.

Mr. Nicoson: I would be willing to stipulate [59] that is the actual date of receipt.

Mr. Cherry: We have no objection to that at all.

Trial Examiner Bennett: Do you agree to that, Mr. Cherry?

Mr. Cherry: Yes.

Trial Examiner Bennett: So stipulated.

* * *

GERALD O. RICHARDSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nicoson: [60]

* * *

Q. (By Mr. Nicoson): I hand you a document which has been marked Respondent's Exhibit 2 for identification, and I will ask you if that reflects the names of the employees who were on the eligibility list, in the employ of Ray Brooks, on the date of the election, April 12, 1951? A. That is right.

Q. I will ask you also if that list shows the employees who were in the employ of Ray Brooks on April 18, 1951? A. That is right.

(Testimony of Gerald O. Richardson.)

Mr. Niccson: I offer this in evidence. [61]

* * *

Trial Examiner Bennett: I note there are 15 names, including the name of the body shop foreman. As I understand it, he was on the eligibility list.

Mr. Nicoson: He was on the eligibility list, and I think counsel will stipulate with me he voted a challenged ballot, which was not counted. He was challenged on the ground of being a supervisor.

Mr. Cherry: Our records indicate that Newman Prudhomme and Mr. Elmer Schmidt, the last name on the list, were challenged. I don't know why Mr. Schmidt was challenged.

Mr. Nicoson: Same ground.

Mr. Cherry: On the ground he was a supervisor?

Mr. Nicoson: Yes.

Mr. Cherry: Those two challenged votes were never resolved, inasmuch as it didn't affect the results of the election.

Trial Examiner Bennett: You apparently are in agreement with Mr. Nicoson.

Mr. Cherry: Yes. [63]

* * *

(The document heretofore marked Respondent's Exhibit No. 2 for identification was received in evidence.) [67]

(Testimony of Gerald O. Richardson.)

RESPONDENT'S EXHIBIT No. 2
(Copy)

Ray Brooks Pay Roll Ending March 24, 1951

Prudhomme, Newman	Body Shop Foreman
Azbill, Harold G.	Mechanic
Cellucci, Frank	Mechanic
Gordon, Frank	Metalman
Phillips, Kenneth	Mechanic
Soulsburg, Melvin Carl	Mechanic
White, Leonard	Metalman
Winn, Franklin	Mechanic
Boyce, Garth	Pick-up & Delivery
Brown, Monte C.	Lube Rack
Bruce, Charles	N/C Polisher
Bruce, Willie	N/C Polisher
Emrick, Verner	Porter
Mills, George	Partsman
Schmidt, Elmer	Partsman

Admitted in evidence October 8, 1951.

* * *

October 9, 1951

Mr. Cherry: The General Counsel has no further witnesses in rebuttal this morning.

Trial Examiner Bennett: There is no rebuttal then?

Mr. Cherry: No rebuttal at all. I don't intend to file a brief, and I would like to argue the case orally.

Trial Examiner Bennett: How about you, Mr Nicoson?

Mr. Nicoson: I think I prefer to file a brief. I think the problem here is largely legal, anyhow, but I would at this time like to make a couple of motions. [71]

* * *

Trial Examiner Bennett: All right, Mr. Cherry, we will hear your argument at this point. [73]

* * *

Mr. Cherry: The 8 (a) (5) allegation, the unfair labor practice in refusing to bargain, is, in my opinion, a very clear-cut issue, and there seems to be no doubt that the union requested bargaining rights, requested a bargaining conference and was turned down.

The only issue appears to be as to why they were turned down, why the company refused to grant the bargaining rights demanded by the union, after winning a consent election and after having been certified by the Board.

There has been no evidence to refute the demand to bargain. There has been no evidence, other than the General Counsel's Exhibit 6, show any reason why they failed to bargain.

Going to Respondent's Exhibits 1-A and 1-B, these were admitted in evidence upon a limited basis. Respondent's Exhibit 1-A is merely a piece of paper in evidence. The contents of it are not of any material importance in this case. The signatures have not been proved. There is no testimony or evidence showing that it was relied upon. There is no testimony or evidence showing that one way

or the other, that it wasn't a forgery. It isn't in evidence for all purposes.

So, as I see the issue, it is just a clear statutory problem as to whether the respondent has to follow the certification and bargain after certification. [74]

* * *

Received October 16, 1951.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

RAY BROOKS,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board, Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled "In the Matter of Ray Brooks and International Association of Machinists, District Lodge 727"; "In the Matter of Ray Brooks and International Association of Machinists for its District Lodge No. 727,"

the same being known as Cases Nos. 21-RC-1868 and 21-CA-1117, respectively, before said Board; such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

Case No. 21-RC-1868

(1) Copy of Petition for Certification of Representatives filed by the International Association of Machinists, District Lodge No. 727, on March 22, 1951.

(2) Copy of Agreement for Consent Election approved by the Regional Director on March 28, 1951 (marked General Counsel's Exhibit No. 2 in Case No. 21-CA-1117 and contained in Volume III of the certified record).

(3) Copy of Tally of Ballots issued by the Regional Director on April 12, 1951 (marked General Counsel's Exhibit No. 3 in Case No. 21-CA-1117 and contained in Volume III of the certified record).

(4) Copy of Certification of Representatives issued by the Regional Director on April 20, 1951 (marked General Counsel's Exhibit No. 4 in Case No. 21-CA-1117 and contained in Volume III of the certified record).

Case No. 21-CA-1117

(5) Order designating Martin S. Bennett Trial Examiner for the National Labor Relations Board, dated October 8, 1951.

(6) Stenographic transcript of testimony taken before Trial Examiner Bennett on October 8 and 9, 1951, together with all exhibits introduced into evidence.

(7) Copy of Trial Examiner Bennett's Intermediate Report, dated October 29, 1951 (annexed to Item 9 hereof); order transferring case to the Board, dated October 29, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(8) Respondent's exceptions to the Intermediate Report, received on November 19, 1951.

(9) Copy of Decision and Order issued by the National Labor Relations Board on April 1, 1952, with Intermediate Report annexed, together with Copy of affidavit of service thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 19th day of August, 1952.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

/s/ LOUIS R. BECKER,
Executive Secretary.

[Endorsed]: No. 13502. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Appellant, vs. Ray Brooks, Appellee. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed August 21, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13502

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

RAY BROOKS,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Ray Brooks, Van Nuys, California, his agents, successors, and assigns. The proceedings resulting in said Order are known upon the records of the Board as "In the Matter of Ray Brooks and International Association of Machinists, District Lodge 727"; "In the Matter of Ray Brooks and International Association of Machinists for its District Lodge No. 727," the same being known as Cases Nos. 21-RC-1868 and 21-CA-1117, respectively.

In support of this petition the Board respectfully shows:

(1) Respondent is an individual engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 1, 1952, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, his agents, successors and assigns. On the same date, April 1, 1952, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board,

and requiring Respondent, his agents, successors, and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD.

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 19th day of August, 1952.

[Endorsed]: Filed August 21, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT ON WHICH PETITIONER INTENDS TO RELY

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner in the above proceeding, in conformity with the rules of this Court, hereby states the following point as that on which it intends to rely herein:

The Board correctly determined that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) and (1) of the Act.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 19th day of August, 1952.

[Endorsed]: Filed August 21, 1952.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To Ray Brooks, 6530 Van Nuys Blvd., Van Nuys, Calif., and International Association of Machinists, District Lodge 727. Att.: Messrs. E. M. Skagen, Walter Owen and D. A. Gordon, 904 Van Nuys Bldg., Los Angeles, Calif.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A., Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 21st day of August, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on April 1, 1952, in a proceeding known upon the records of the said Board as:

> "In the Matter of Ray Brooks and International Association of Machinists for its District Lodge No. 727, Case No. 21-CA-1117,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days

from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 21st day of August, in the year of our Lord one thousand nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writ attached.

[Endorsed]: Filed August 30, 1952.

[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Ray Brooks, respondent in the above-entitled matter, and for answer to the petition for enforcement of the order of the National Labor Relations Board, denies, admits and alleges as follows:

I.

Respondent admits that he is an individual engaged in business in the State of California, within the judicial circuit of this Honorable Court, but denies that any unfair labor practice occurred within that judicial circuit or any other judicial circuit. Respondent further admits that by virtue of Section 10 (e) of the National Labor Relations Act as amended, this Honorable Court has jurisdiction to review purported orders of the National Labor Relations Board.

II.

Respondent admits that pursuant to proceedings before the Board in this matter, the Board, on April 1, 1952, stated its findings of fact and conclusions of law and issued an order directed to the Respondent, his agents, successors and assigns. Respondent further admits that on the same date, April 1, 1952, the Board's decision and order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

III.

The Respondent cannot answer the third paragraph of the Petition since he has no knowledge thereof.

IV.

Further answering, Respondent admits that the purported findings of the National Labor Relations Board to the effect that the Respondent is engaged in a business affecting commerce within the mean-

ing of the National Labor Relations Act as amended is not supported by substantial evidence, and is therefore void and of no effect.

V.

Further answering, Respondent alleges that the said purported order of the National Labor Relations Board is unconstitutional and void in that it deprives Respondent of rights guaranteed him by the Fifth Amendment ot the United States Constitution.

VI.

Further answering, Respondent alleges that the record does not contain substantial evidence sufficient in law to support the said purported order of the National Labor Relations Board.

Wherefore, Respondent having fully answered, prays that the Petition for the enforcement of the order of the National Labor Relations Board be dismissed.

CARTER & POTRUCH,

By /s/ FREDERICK A. POTRUCH.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 5, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT, RAY BROOKS, INTENDS TO RELY.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Respondent Ray Brooks, in conformity with the laws of this Court, hereby states that the following points are those on which he intends to rely herein:

(1) The National Labor Relations Board did not have jurisdiction over respondent, Ray Brooks, or his business.

(2) The proceedings before the National Labor Relations Board are unconstitutional and void in that they have deprived respondent of rights guaranteed to him by the Fifth Amendment to the United States Constitution.

(3) The Board's Findings of Fact and Conclusions of Law that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) (1) of the National Labor Relations Act as amended were not supported by substantial eviednce on the record considered as a whole and therefore are void and of no effect.

Dated at Los Angeles, California, this 2nd day of September, 1952.

CARTER & POTRUCH,

By /s/ FREDERICK A. POTRUCH.

[Endorsed]: Filed September 5, 1952.

No. 13502

United States
Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

RAY BROOKS,

Appellee.

Petition for Enforcement of an Order of the National Labor Relations Board

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Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, February 24, 1953.

Before: Mathews, Stephens and Bone,
Circuit Judges.

ORDER OF SUBMISSION

Ordered petition for enforcement herein argued by Mr. Wm. J. Arvutis, Attorney, National Labor Relations Board, counsel for the petitioner, and by Mr. Erwin Lerten, counsel for respondent, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, May 14, 1953.

Before: Mathews, Stephens and Bone,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 13,502

May 14, 1953

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

RAY BROOKS,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: Mathews, Stephens and Bone,
Circuit Judges.

Bone, Circuit Judge:

OPINION

This is a petition by the National Labor Relations Board for enforcement of the Board's order directing, among other things, that respondent bargain collectively with International Association of Machinists, District No. 27 (hereinafter called "Union"). The order was issued after the usual proceedings under § 10 of the National Labor Relations Act, as amended, in which the Board found that respondent had refused to bargain collectively with

the Union, in violation of §§ 8(a) (1) and 8(a) (5) of the Act.[1]

Respondent resists enforcement upon three grounds: (1) that the Board does not have jurisdiction over the unfair labor practices charged; (2) that the Board's finding that respondent refused to bargain is not supported by substantial evidence on the record considered as a whole; and (3) that the Board's finding that at the time of the alleged refusal to bargain the Union represented a majority of the employees in the appropriate bargaining unit is not supported by substantial evidence on the record considered as a whole.

Respondent, an individual, sells Chrysler and Plymouth automobiles at Van Nuys, California, as a dealer under franchise from the Chrysler Corporation, which operates in California and other states. During the calendar year 1950 respondent

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[1]Section 8(a) (1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under § 7 of the Act.

Under § 8(a) (5) of the Act it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a) of the Act reads as follows:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"

purchased automobiles of a value in excess of $400,000 from the Chrysler Corporation. All of these automobiles were purchased, assembled and sold within the State of California. Approximately 50 per cent of the parts going into the automobiles were shipped into California from outside the state.

On the question whether respondent is engaged in commerce within the meaning of the National Labor Relations Act, our very recent case of National Labor Relations Board v. Howell Chevrolet Company, 9 Cir., .. F.2d .., decided February 26, 1953, in which on facts almost identical to those involved in the case at bar we upheld the jurisdiction of the Board, is controlling. See also National Labor Relations Board v. Townsend, 9 Cir., 185 F. 2d 378, cert. denied 341 U.S. 909; National Labor Relations Board v. Ken Rose Motors, 1 Cir., 193 F. 2d 769.

The facts as to the alleged refusal of respondent to bargain with the Union are as follows. On April 12, 1951, the Board conducted a consent election among respondent's employees to determine whether the employees desired the Union to represent them in collective bargaining. Of the 15 employees in the concededly appropriate bargaining unit, eight voted for the Union. No objection to the election was filed and on April 20, 1951, the Regional Director certified the Union as the employees' bargaining representative.

On April 19, 1951, one week after the election and the day before the certification was issued, respond-

ent, the Union and the Board each received by mail a sheet reading:

"April 18, 1951

"We the undersigned majority of the employees of Ray Brooks, Chrysler-Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent. We respectfully submit this petition for your consideration."

The purported signatures of nine of the 15 employees in the bargaining unit were appended beneath.

On April 27 a Union representative asked respondent for a conference to negotiate a collective bargaining contract. Respondent by his counsel, replied by letter on May 1. In the letter respondent declared that he had been "given to understand" that the majority of the employees had repudiated the Union and no longer wished to be represented by it. Respondent then called attention to a recent decision of the Court of Appeals for the Sixth Circuit (apparently N.L.R.B. v. Vulcan Forging Co., 6 Cir., 188 F.2d 927) holding that an employer could not be compelled to bargain with a union under such circumstances. Respondent concluded his letter:

"Under the circumstances wouldn't it be wiser to defer consideration of the proposed negotiations until such time as it might appear that the employees desire to have your union represent them?"

There is no evidence of any further communication between respondent and the Union.

Respondent contends that its letter of May 1 did not constitute a refusal to bargain, but only a request for the "Union's opinion as to the advisability of a meeting in view of the repudiation of the Union by the employees." The letter, written by respondent's counsel, refers to a favorable court decision, indicates its effect, and suggests, albeit in question form, that it would be "wiser" to put off any negotiation until it appeared that the Union had secured a majority of the employees in the bargaining unit. While clothed in polite and conciliatory language, the purport of the letter was that, unless and until the Union could prove its majority, the employer was under no legal obligation to bargain and was not inclined to do so. We cannot say that the Board was unjustified in construing this letter as a refusal to bargain.[2]

We think we must regard the purported communication of the employees repudiating the Union as authentic. At the same time that the employees'

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[2]The conclusion of the letter, quoted above in the text of the opinion, is an almost verbatim copy of a letter written under similar circumstances and quoted by the court in the case referred to in respondent's letter. See N.L.R.B. v. Vulcan Forging Co., 6 Cir., 188 F.2d 927, at 929. In that case the court took the position that the letter constituted a refusal to bargain, but held that since the employees had repudiated the bargaining agent the employer was not required to bargain. The case is discussed, infra.

communication was sent to respondent, copies were also sent to the Union and to the Board. There is no evidence that the Union ever challenged its genuineness, although it would have been a simple task to check whether the nine purported signatories had in fact signed the document and it was clearly to the interest of the Union to make the fact known if they had not. It was proved that the names signed were names of employees in the bargaining unit. While respondent did not call the purported signers to verify their signatures, counsel supporting the complaint neither moved to strike the document for such failure nor made any attempt to impeach it. Under these circumstances we think it would be unreasonable to stamp the communication a possible forgery, and accordingly we take it as a fact that a majority of respondent's employees repudiated the Union on April 18, 1951.

The final question presented is whether respondent was obliged to bargain with the Union in light of the repudiation of the Union by a majority of respondent's employees within a week after the Union had been designated as bargaining representative in a Board-conducted election. This problem has given the courts some difficulty and the decisions are not harmonious. This court has not previously had occasion to pass upon the question.[3]

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[3]This court has decided related questions. In N.L.R.B. v. Hollywood-Maxwell Co., 9 Cir., 126 F.2d 815, we held that where nearly two years elapsed after the choice of a bargaining representative and the employees repudiated the union upon discover-

The Wagner Act, as the National Labor Relations Act was known prior to its amendment in 1947, contained provisions for Board-conducted elections but did not specify the intervals at which such elections should be held or the effect of a certification once issued.

The Board saw fit to adopt a rule that when a bargaining representative had been elected by a majority of the employees in an appropriate unit and certified by the Board, its representative status could not be disturbed for a reasonable period, normally about a year. Whittier Mills Company, 15 NLRB 457, enforced 5 Cir., 111 F.2d 474; Century Oxford Mfg. Corp., 47 NLRB 835, enforced 2 Cir.,

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ing that the union's organizer had been bribed by the employer, the employer could not be ordered to bargain with the union. In N.L.R.B. v. Biles Coleman L. Co., 9 Cir., 96 F.2d 197, we held that where the employees repudiated their bargaining representative after the Board had issued its order and prior to its enforcement by this court, the employer could nonetheless be compelled to bargain with the union. The latter holding is in accord with the unanimous view. See, e.g., N.L.R.B. v. Swift & Co., 3 Cir., 162 F.2d 575, cert. denied 332 U.S. 791; N.L.R.B. v. S. H. Kress & Co., 6 Cir., 194 F.2d 444. It is also settled that where the representative's loss of majority is attributable to unfair labor practices on the part of the employer, the employer may still be compelled to bargain with the union. Franks Bros. Co. v. N.L.R.B., 321 U.S. 702; N.L.R.B. v. Andrew Jergens Co., 9 Cir., 175 F.2d 130, cert. denied 338 U.S. 827; N.L.R.B. v. Swift & Co., supra; Superior Engraving Co. v. N.L.R.B., 7 Cir., 183 F.2d 783, cert. denied 340 U.S. 930.

140 F.2d 541; Lift Trucks, Inc., 75 NLRB 998; Majure Transport Company, 95 NLRB 311, enforced 5 Cir., 198 F.2d 735; see Celanese Corp. of America, 95 NLRB 664, 672, and the extended discussions of the Board's rule in National Labor Relations Board v. Globe Automatic Sprinkler Co., 3 Cir., 199 F.2d 64, 68, 69, and General Box Company, 82 NLRB 678. However, the rule was qualified by the proviso that the union's majority could be challenged within the certification year where "unusual circumstances" were present.[4]

While the Board's rule did violence to orthodox principles of agency and on first impression appeared inconsistent with the Wagner Act's guarantee of the right of employees to bargain through representatives of their own choosing, the rule was approved by most of the courts which passed upon it prior to the amendment of the Act in 1947. NLRB v. Century Oxford Mfg. Co., 2 Cir., 140 F.2d 541, cert. denied 323 U.S. 714; NLRB v. Botany Worsted Mills, 3 Cir., 133 F.2d 876, cert. denied 319 U.S. 751;

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[4]The Board found "unusual circumstances" where the union representing the employees was dissolved, Public Service Electric & Gas Co., 59 NLRB 325; where the bargaining representative switched its affiliation from one international union to another, so that the identity of the bargaining agent was doubtful, Carson Pirie Scott & Co., 69 NLRB 935; Jasper Wood Products Co., Inc., 72 NLRB 1306; where the number of employees in the bargaining unit doubled or quadrupled in the space of a year, Westinghouse Electric & Manufacturing Co., 38 NLRB 404; Celanese Corporation of America, 73 NLRB 864.

NLRB v. Appalachian E. Power Co., 4 Cir., 140 F.2d 217; see NLRB v. Prudential Life Insurance Co., 6 Cir., 154 F. 2d 385, 389; Wilson & Co., Inc., v. NLRB, 8 Cir., 162 F.2d 310; but cf. NLRB v. Inter-City Advertising Co., 4 Cir., 154 F.2d 244.

The Courts found ample justification for the rule. The Board's election procedure, with its advantage of impartial supervision and its guarantee of anonymity to employees in expressing their choice by secret ballot, had been designed by Congress as the most effective and reliable means of ascertaining the employees' deliberate will. Thus, when the results of such election had been certified by the Board, it was felt that repudiation of the certified representative should be established only by an equally probative technique. NLRB v. Botany Worsted Mills, 3 Cir., 133 F.2d 876, 881, 882, cert. denied 319 U.S. 751; NLRB v. Century Oxford Mfg. Co., 2 Cir., 140 F.2d 541, 542, 543, cert. denied 323 U.S. 714; NLRB v. Appalachian E. Power Co., 4 Cir., 140 F.2d 217, 222; and see the Board's opinion in the Century Oxford Mfg. Corp. case, supra, 47 NLRB 835, 845.

It was impracticable, however, for the Board to conduct elections to keep pace with every change in the sentiments of the employees in a bargaining unit. See National Labor Relations Board v. Century Oxford Mfg. Co., supra, at page 542; NLRB v. Inter-City Advertising Co., 4 Cir., 154 F.2d 244, 247. The processing of an election, if it were contested, consumed several months. The Board, therefore, adopted the practice of entertaining petitions

for an election in a bargaining unit only after a year had elapsed since the Board's last previous certification of a representative for that unit. The interval between elections coincided with the period which the Board usually held to be a "reasonable time" for suspension of the power of employees to oust their certified representative. This did not mean, however, that a representative's authority could be revoked only in a Board-conducted election. When a reasonable time had elapsed after certification, usually a year, the presumption of the certified union's authority could be rebutted by a showing that the majority of the employees had repudiated the union, whether this choice was made manifest in an election or otherwise.

The Board's rule above referred to was also justified upon the ground that it was necessary to secure stability in bargaining relationships. As the court said in NLRB v. Century Oxford Company, supra, at p. 541:

> "Inherent in any successful administration of such a system is some measure of permanence in the results: freedom to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise."

And in NLRB v. Botany Worsted Mills, supra, at p. 881, it was said, in answer to the argument that

employees were free to oust their certified bargaining representative at any time:

> "The argument, while containing some elements of plausibility, would, if accepted, make chaos out of the administration of the statute and prevent the protection of the very rights which it aimed to secure. Litigants in all law suits are entitled to their rights under the law, but they must work them out in orderly fashion according to rule."

In NLRB v. Appalachian E. Power Co., supra, the court said, at p. 221:

> "To assume that the Board's certification speaks with certainty only for the day of its issuance and that a company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority status would lead to litigious bedlam and judicial chaos."[5]

The Labor Management Relations Act of 1947 (commonly known as the Taft-Hartley Act), like the Wagner Act, is silent as to the effect of a Board certification of a bargaining agent. However, in

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[5]Cf. the Board's rule that where there is a bargaining contract between a bargaining agent and the employer, the agent's representative status cannot be challenged until near the end of the contract term, approved in NLRB v. Geraldine Novelty Co., Inc., 2 Cir., 173 F.2d 14, 16, 17.

passing the Taft-Hartley Act, Congress was fully advised of the binding effect given by the Board and the courts to a Board certification of a representative under the Wagner Act. With reference to § 9(c) (3) of the Senate Bill, now § 9(c) (3) of the Act, which provides, inter alia, that elections in any given bargaining unit may be held only once a year,[6] the Senate Report (submitted by Senator Taft) stated:

> "This amendment prevents the Board from holding elections more often than once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having received a majority. At present, if the union loses, it may on presentation of additional membership cards secure another election within a short time, but if it wins its majority cannot be challenged for a year." (Emphasis ours.) S. Rep. No. 105, 80th Cong., 1st Sess., p. 25.

Senator Taft, in explaining § 9(c) (3) on the Senate floor, said:

> "The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for

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[6] § 9(c) (3) of the Act provides in part as follows: "(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *"

> one year. He remains the bargaining agent until the end of that year." (Emphasis ours.) 93 Cong. Rec. 3954. [Legislative History of the Labor Management Relations Act, 1947, Vol. 2, p. 1013.]

And in the Senate Report (S. Rep. No. 105, 80th Cong., 1st Sess., p. 12) it was stated:

> "In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, the bill also provides that elections in any given unit may not be held more frequently than once a year." (Emphasis ours.)

If a certification was thought to be as meaningless and ephemeral as respondent would have us believe, it is hard to see how employees would approach a Board election with any solemnity, whether the interval between elections be one year or ten.[7]

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[7]Giving further indication that in 1947 Congress was aware of the effect given a Board certification is the history of § 9(f) (7) of the House Bill, H. R. 3020. This provision would have limited certification elections to one a year, but would have permitted decertification elections at any time. Congressman Klein, in opposing the provision, said:

"Section 9(f) (7) * * * throws sharply into focus the remarkable bias of this bill against collective bargaining. That section prohibits an election in any unit or subdivision thereof in which a valid election has been held within the preceding 12 months. A sole exception is made in the case of an application to decertify a union, which I have just discussed. Consider the result—the greatest con-

It is plain that Congress, in the course of adopting the 1947 amendments to the Act, was well aware of the rule, adopted and regularly applied by the Board and approved by the courts, making the certification of a bargaining agent binding on the employees represented for a reasonable time. Under these circumstances it is a fair assumption that by its silence on the question Congress accepted this administrative and judicial construction of the Act. NLRB v. Gullett Gin Co., 340 U.S. 361, 365, 366.[8]

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fusion and uncertainty if the employees have selected a bargaining representative, but absolute finality for 12 months if they have not." (Emphasis ours.) 93 Cong. Rec. 3557.

It is significant that the provision allowing a decertification election at any time was deleted from the House bill in conference. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 49.

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[8]While it is quite clear that Congress by its silence adopted the rule that a certification of a bargaining agent is binding on the employees for a reasonable time, we need not, for the purposes of this case, and we do not go so far as to say that Congress adopted a rigid rule fixing one year as the term of the certified bargaining agent's representative status. While this was the period often prescribed by the Board prior to the Taft-Hartley Act, and it appears that Congress was aware that this was the period so prescribed, the Board, prior to 1947, was by no means consistent or unqualified in stating that a certified union's representative status continued for the period of one year. See NLRB v. Globe Automatic Sprinkler Co., 3 Cir., 199 F.2d 64, where the court pointed out that the Board generally defined the certification period as a "reasonable time," "cus-

Of the cases arising since the passage of the Taft-Hartley Act, all but one appear to approve the rule that the representative status of a certified bargaining agent is beyond challenge for at least a "reasonable time." See NLRB v. Worcester Woolen Mills Corp., 1 Cir., 170 F.2d 13, 17, cert. denied 336 U.S. 903; NLRB v. Globe Automatic Sprinkler Co., 3 Cir., 199 F.2d 64, 69; NLRB v. Sanson Hosiery Mills, 5 Cir., 195 F.2d 350, 352, 353, cert. denied 344 U.S. 863; Superior Engraving Co. v. NLRB, 7 Cir., 183 F.2d 783, 792, cert. denied 340 U.S. 930; contra: NLRB v. Vulcan Forging Co., 6 Cir., 188 F.2d 927.

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tomarily" or "usually about one year." In the Globe Automatic Sprinkler case the court refused to enforce an order requiring an employer to bargain with a union which had been repudiated by a majority of the employees in the bargaining unit eleven months and one week after certification of the union, on the ground that a "reasonable time" had elapsed after certification.

Cf. National Labor Relations Board v. Sanson Hosiery Mills, Inc., 5 Cir., 195 F.2d 350, cert. denied 344 U.S. 863, where the court apparently took the position that the only means of recalling a certified bargaining representative was by another Board-conducted election, regardless of the length of time which had elapsed since certification. The Board itself has not gone so far. The Board now follows the rule that the fact of the union's majority during the certification year can be rebutted only by a showing of unusual circumstances. However, after the first year of the certificate has elapsed, though the certificate still creates a presumption of the certified union's majority, the presumption is rebuttable in the absence of unusual circumstances. Celanese Corporation of America, 95 NLRB 664.

In the Vulcan Forging case, supra, which appears to stand alone the court set aside an order of the Board directing an employer to bargain with the certified bargaining representative where the employees had repudiated the representative just eight days after a Board-conducted election. The court said, at p. 931:

> "They [the employees] are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through the representative of their choice."[9]

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[9]Aside from the Vulcan case, the only case which could be of comfort to respondent is NLRB v. Inter-City Advertising Co., 4 Cir., 154 F.2d 244. The bargaining unit in that case consisted of only four employees when a Board-conducted election resulted in a union's being certified as bargaining representative for the unit. Thereafter the employer, without being actuated by hostility toward the union, and in due course of business, made changes in working hours in the plant. As a consequence, one of the employees in the bargaining unit was discharged. Another was replaced and transferred to another department. At the time of the refusal of the employer to bargain only one of the three employees in the bargaining unit was a union member. The court, one member dissenting, set aside an order of the Board directing the employer to bargain with the union. The court distinguished its earlier case of NLRB v. Appalachian E. Power Co., 4 Cir., 140 F.2d 217, on the ground that it would have been a

The language quoted overstates the effect of the rule that the authority of a certified bargaining agent is irrevocable for a "reasonable time." While under that rule the exercise of the right of employees to oust their representative is suspended for a time, employees are certainly not "deprived" of that right. And even this temporary suspension of the right is not recognized where unusual circumstances would render it plainly unreasonable or unjust. The question is whether this limited restriction on the rights of employees is consistent with the policies and provisions of the National Labor Relations Act considered as a whole. In light of what we consider the manifest intent of Congress, and in accordance with the great weight of judicial authority, we think that it is.

We are of the opinion that the right of employees to bargain through representatives of their own choosing must be, and was intended to be, restricted to the extent necessary to make workable and effective the administrative scheme devised for the protection of that right and for the promotion of the other objectives of the Act. A primary objective of the Wagner Act, and to an even greater extent the Taft-Hartley Act, was stability in industrial relationships. To achieve the desired industrial repose

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simple task for the Board to conduct another election because of the small size of the bargaining unit. The Inter-City case could well be said to have involved "unusual circumstances." It is of dubious precedent value in light of the dictum in the recent case of NLRB v. Borchert, 4 Cir., 188 F.2d 474.

"a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Franks Bros. Co. v. NLRB, 321 U.S. 702, 705; see NLRB v. Prudential Insurance Co., 6 Cir., 154 F.2d 385, 389.

If the argument of respondent is accepted, a Board-conducted election and certification, instead of inaugurating a period of industrial repose, would lead only to continued raiding of the bargaining agent's membership and the disrupting influence of rival union activities within the bargaining unit itself. Employers would be beset by conflicting demands and claims for recognition without a means of determining with certainty whether, or with whom, they should bargain. Bargaining relationships once established would be subject to destruction upon every volatile whim or caprice and before results could be achieved and judged by the intended beneficiaries. It was this situation which the provisions for Board-conducted elections were designed to obviate. We see no reason why this purpose should be frustrated by treating the right of employees to choose their representatives as an absolute, above reasonable restrictions designed to promote "some degree of sobriety and responsibility" in the exercise of that right.

Returning to the facts of the case at bar, it is plain that when the employees repudiated the Union one week after the election a "reasonable time" had not passed to give the bargaining relationship a fair

chance to succeed. No unusual circumstances appear. Accordingly, the Board was justified in concluding that the Union continued to be the bargaining representative for the employees and that respondent's refusal to bargain constituted an unfair labor practice.

The order of the Board is affirmed and will be enforced.

(Endorsed): Opinion. Filed May 14, 1953. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 13,502

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

RAY BROOKS,

Respondent.

DECREE

On petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the petition of the National Labor Relations Board, filed herein on August 21, 1952, for enforcement of its order herein of April 1, 1952, and on the answer of respondent Ray Brooks, filed September 5, 1952, to said petition, and on the transcript of record herein, briefs filed by respective parties, and oral arguments had thereon, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the said petition to enforce be, and hereby is granted, and that the respondent, Ray Brooks, Van Nuys, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District Lodge

No. 727, as the exclusive representative of all his employees, excluding salesmen, guards, professionals, and supervisors;

(b) In any manner interfering with the efforts of International Association of Machinists, District Lodge No. 727, to bargain collectively with him in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District No. 727, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at his place of business at Van Nuys, California, copies of the notice attached to the Intermediate Report and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by him for a period of sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Decree what steps Respondent has taken to comply herewith.

Appendix A

Notice to All Employees

Pursuant to a Decree of the United States Court of Appeals Enforcing a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Bargain collectively upon request with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all employees in the bargaining unit described herein with respect to rate of pay, wages, hours, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees of Ray Brooks, Van Nuys, California, but excluding salesmen, guards, professionals, and supervisors.

We Will Not in any manner interfere with the efforts of the above-named union to bargain collectively with us, or refuse to bargain with said union

as the exclusive representative of the employees in the bargaining unit set forth above.

Dated.....

RAY BROOKS,
(Employer.)

By.....
(Representative.) (Title.)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed May 14, 1953.
PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday, December 16, 1953.

Before: Mathews, Stephens and Bone,
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of respondent, filed June 2, 1953, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 89 pages, numbered from and including 1 to and including 89, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the respondent, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of January, 1954.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 536

RAY BROOKS, Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI—Filed March 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 21

RAY BROOKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

MISCELLANEOUS

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No. .....

October Term, 1953.

RAY BROOKS,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Ray Brooks, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 14, 1953.

Opinions Below.

The order of the National Labor Relations Board [R. 24] is reported in 98 N. L. R. B. 976. The opinion of the Court of Appeals [R. 66] is reported in 204 F. 2d 899.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 14, 1953 [R. 85]. A petition for rehearing filed on June 2, 1953, was denied on December 16, 1953 [R. 89]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether an employer is required to continue to bargain with a union whose authority to represent his employees had been revoked by a majority of the employees represented by the union, without any unfair labor practice on the employer's part.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 1 to 5.

Statement.

On April 12, 1951, the Board conducted an election among Petitioner's employees. This election resulted in a majority of the employees voting for the Union. On April 19, 1951, Petitioner received in the mail a document reading:

> "We, the undersigned majority of the employees of Ray Brooks, Chrysler Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent.
>
> "We respectfully submit this petition for your consideration."

This document was signed by nine of the fifteen employees of Petitioner in the collective bargaining unit found appropriate by the Board. A duplicate of this document was, on or about the same date, received by the Union [R. 10].

On April 27, 1951, a representative of the Union wrote Petitioner and requested a meeting for the purpose of negotiating a contract [R. 16]. On May 1, 1951, Petitioner, by his counsel, sent the following reply to the Union:

> "Your letter of April 27 addressed to Mr. Ray Brooks has been forwarded to us. Both Mr. Brooks and we have been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it.
>
> "A recent decision of the United States Court of Appeals for the Sixth Circuit held in a similar situation that it would be improper to compel the employees to be represented by a discredited union and that to force them to bargain through a representative which they had repudiated would be depriving them of their rights to bargain through a representative of their choice.
>
> "Under the circumstances wouldn't it be wiser to defer the consideration of the proposed negotiations until such time as it might appear that the employees desired to have your union represent them?"

The Union made no reply to this letter [R. 41-42, 17].

The Board, after the usual proceedings issued a decision and order in which it found that the petitioner had engaged in interference, restraint and coercion of its employees in violation of Section 8(a)(1) of the Act, and had refused to bargain collectively with the Union as the

exclusive representative of the petitioner's employees in violation of Section 8(a)(5) of the Act. The Court of Appeals granted a decree of enforcement of the Board's Order [R. 85].

Specification of Errors to Be Urged.

The court below erred:

1. In failing to hold that at any time employees may revoke the authority of a labor organization to represent them as their bargaining representative.

2. In ruling that a Board certification of bargaining representatives prevents employees from revoking the authority of a labor organization to represent the employees "for a reasonable period" after the certification.

3. In ruling that petitioner was required to continue to bargain with the Union as the bargaining representative of his employees, despite the fact that a majority of the employees, without any unfair labor practice on the part of petitioner, had revoked the authority of the Union to represent them as their bargaining representative.

4. In enforcing the Board's order.

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is directly in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *N. L. R. B. v. Vulcan Forging Co.*, 188 F. 2d 927, and *Mid-Continent Petroleum Corporation v. N. L. R. B.*, 204 F. 2d 613, certiorari denied 74 S. Ct. 71.

2. The conflict between the *Vulcan Forging Co.* case and the instant case was recognized in the court below [R. 81]. The court below also recognized that its decision

in the instant case might be in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *N. L. R. B. v. Inter-City Advertising Co.*, 154 F. 2d 244 [R. 81]. Also, in the *Mid-Continent Petroleum* case, the Sixth Circuit, after reviewing the decisions of the various circuits on the question presented by the instant case stated (204 F. 2d at p. 619):

> "From the foregoing adjudications, there manifestly appears considerable conflict in the circuits, on the issue here before us."

3. The original National Labor Relations Act, commonly known as the Wagner Act, gave employees the right to bargain collectively through representatives of their own choosing. The amended Act, commonly known as the Taft-Hartley Act, also gives employees, for the first time, the right to refrain from collective bargaining. The instant case and the *Vulcan Forging* and *Mid-Continent Petroleum* cases are the only cases arising since the passage of the Taft-Hartley Act which rule on the issue in this case.

4. Clearly, the question presented here is of fundamental importance to the administration of the Labor-Management Relations Act of 1947. Until the conflict of decisions on this question is resolved neither employers, labor organizations or employees can be certain of the effect of a Board certification upon their rights and obligations under the statute.

5. The decision of the court below is believed to be erroneous and the conflicting decisions of the United States Court of Appeals for the Sixth Circuit in *N. L. R. B. v. Vulcan Forging Co.*, and *Mid-Continent Petroleum Corporation v. N. L. R. B., supra*, correct. It is a well established common law principle that when an agency is

not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal, so long as it is unexecuted.[1] It is equally well settled that statutes in derogation of the common law are to be strictly construed.[2] The National Labor Relations Act, as amended in no place provides, or even implies, that the common law rule with respect to the revocation of an agent's authority by his principal has in any wise been limited. In fact, as the Court stated in *N. L. R. B. v. Vulcan Forging Co., supra*:

> "It would clearly be contrary to the express purpose of the Act to require the employees in this case to bargain through a representative that practically all of them had repudiated. They are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through a representative of their own choosing."

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK A. POTRUCH,
ERWIN LERTEN,
H. BURDETTE FREDERICKS,
Counsel for Petitioner.

January, 1954.

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[1] 2 Am. Jur. 37, and cases cited therein; Restatement of the Law of Agency, Sec. 118.

[2] 50 Am. Jur. 340-341, and cases cited therein.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * * *

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declined to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct

an election by secret ballot and shall certify the results thereof.

* * * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES.

Section 10. * * *.

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon

such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, in-

cluding the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * * * * *

IN THE

Supreme Court of the United States

October Term, 1954.

No. 21.

RAY BROOKS,

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vs.

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BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The order of the National Labor Relations Board [R. 24-27] was issued on April 1, 1952, and is reported in 98 N. L. R. B. 976. The opinion of the Court of Appeals [R. 66-84] is reported in 204 F. 2d 899.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 14, 1953 [R. 85-88]. A petition for rehearing filed on June 2, 1953 was denied on December 16, 1953 [R. 89]. The petition for writ of certiorari was filed January 15, 1954 and was granted March 8, 1954. The jurisdiction of this Court rests on 28 U. S. C., Section 1251(1).

Question Presented.

Whether an employer is required to continue to bargain with a union whose authority to represent his employees has been revoked by a majority of the employees represented by the union, without any unfair labor practice on the employer's part.

Statute Involved.

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 1-5.

Statement.

On April 12, 1951, the Board conducted an election among Petitioner's employees. This election resulted in a majority of the employees voting for the Union. On April 19, 1951, Petitioner received in the mail a document reading:

> "We, the undersigned majority of the employees of Ray Brooks, Chrysler Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent.
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> "We respectfully submit this petition for your consideration."

This document was signed by nine of the fifteen employees of Petitioner in the collective bargaining unit found appropriate by the Board. A duplicate of this document was, on or about the same date, received by the Union [R. 10].

On April 27, 1951, a representative of the Union wrote Petitioner and requested a meeting for the purpose of negotiating a contract [R. 16]. On May 1, 1951, Petitioner, by his counsel, sent the following reply to the Union:

> "Your letter of April 27 addressed to Mr. Ray Brooks has been forwarded to us. Both Mr. Brooks and we have been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it.
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> "Under the circumstances wouldn't it be wiser to defer the consideration of the proposed negotiations until such time as it might appear that the employees desired to have your union represent them?"

The Union made no reply to this letter [R. 41-42, 17].

The Board, after the usual proceedings issued a decision and order in which it found that the Petitioner had engaged in interference, restraint and coercion of its employees in violation of Section 8(a)(1) of the Act, and had refused to bargain collectively with the Union as the exclusive representative of the Petitioner's employees in violation of Section 8(a)(5) of the Act. The Court of Appeals granted a decree of enforcement of the Board's Order [R. 85].

Specification of Errors to Be Urged.

The Court below erred:

1. In failing to hold that at any time employees may revoke the authority of a labor organization to represent them as their bargaining representative.

2. In ruling that a Board certification of bargaining representatives prevents employees from revoking the authority of a labor organization to represent the employees "for a reasonable period" after the certification.

3. In ruling that Petitioner was required to continue to bargain with the Union as the bargaining representative of his employees, despite the fact that a majority of the employees, without any unfair labor practice on the part of Petitioner, had revoked the authority of the Union to represent them as their bargaining representative.

4. In enforcing the Board's order.

Summary of Argument.

A union has no rights independent of the employees who chose the union as their representative for the purposes of collective bargaining. The union is only an agent of the group of employees which it represents. It is a well established common law principle of agency that when an agency is not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal as long as it is unexecuted. It is equally well settled that statutes in derogation of the common law are to be strictly construed. The National Labor Relations Act in no place provides, or even implies, that the statute in any wise limits the common law rule with respect to the revocation of an agent's authority by his

principal. In fact, that statute specifically provides that employees shall have the right to be represented by representatives of their own choosing and also gives to employees the right to refrain from collective bargaining. Accordingly, it is clear that the National Labor Relations Act, instead of restricting the common law right of employees to revoke the authority of their agent, reaffirms that common law right.

Argument.

> "A bargaining agent, under the National Labor Relations Act . . . is but an agent for a principal and not an independent contractor. His principal is the entire group of employees whom the agent represents. This is made clear by Section 7 of the National Labor Relations Act, which assures to employees the right 'to bargain collectively through representatives of their own choosing.' The important word in this connection is the word 'representatives.' The bargaining agent is a representative, not an independent contractor. He is clothed with all the rights of a representative, but is subject to all the fiduciary obligations of a representative." (*Graham v. Southern Railway Co.* (D. C. D. C.), 74 Fed. Supp. 663.)

Thus, a union has no rights independent of the employees who chose the union as their representative for the purposes of collective bargaining. The union is simply an agent which is subordinate to its principal.

It is a well established common law principle that when an agency is not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal so long as it is unexecuted. (2 Am. Jur. 37, and cases cited therein; Restatement of Law of Agency,

Sec. 118; Civ. Code of Calif., Sec. 2356.) Thus, since the authority of a union as the collective bargaining representative of a group of employees owes its existence to a majority of that group of employees, that authority may be terminated by express revocation by a majority of that group of employees, absent unfair labor practices inducing the revocation. As Mr. Justice Rutledge stated in his dissenting opinion in *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 696-697:

> "Unless a designated union acquires by its selection, a thraldom over the men who designate it, analogous to the power acquired by one who has a 'power coupled with an interest,' unbreakable and irrevocable by him who gave it, it would seem that any powers that it may acquire by virtue of the designation would end whenever those who conferred them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves . . . I do not think Congress intended, by this legislation to create rights in unions overriding those of the employees they represent. Nor did it require a special form or mode for ending a collective agency any more than for creating it. *What Congress did was to give the designated union the exclusive right to bargain collectively as long as, and only as long as, a majority of the employees of the unit consent to its doing so.*" (Italics ours.)

The majority opinion of this Court in the *Medo Photo Supply Corp.* case, *supra*, has been cited by the Board in support of its view that an employer is obligated to bargain with a certified union for a reasonable period of time which is normally one year. However, this Court did

not pass upon the duration of certification question in that case. This Court stated (321 U. S. at pp. 684-685):

> "There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, *if at all*, or the formalities, if any, necessary for such a revocation." (Italics ours.)

The decision of this Court in *Frank Bros. v. N. L. R. B.*, 321 U. S. 702, is also cited by the Board as upholding its doctrine. However, that case is not relevant here since in that case the union lost its majority after the employer wrongfully had refused to bargain with it. Further, as in the *Medo Photo Supply Co.*, case, *supra*, no attempt was made by the employees to revoke the union's authority.

It is well settled that statutes in derogation of the common law are to be strictly construed (50 Am. Jur. 340-341, and cases cited therein). The National Labor Relations Act in no place provides, or even implies, that the common law rule with respect to the revocation of an agent's authority by his principal has in any wise been limited. In fact, the express provisions of that Act support a contrary result. Thus, the Act in its declaration of policy states that the purpose of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." If the employees are not free to revoke the authority of a union to represent them, that union could negotiate a contract with the employer on behalf of the employees it purports to represent. In that

event, we would have a situation where the employees would be required to work under terms and conditions of employment fixed by a representative who not only is not of their own choosing but whom they have expressly rejected. As the Third Circuit stated in *National Labor Relations Board v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 70:

> "Such a situation would be intolerable no doubt to the employees, and certainly not conducive to the industrial repose sought by the Act. It would be in express violation of their lawful right under the Act to bargain collectively through a representative of their own choosing and to enjoy 'full freedom of association, self-organization and designation of representatives.' It is regrettable that in dealing with this situation the Board appears to have focused its attention solely upon the relationship, under the asserted one-year rule, between the employer and the certified union, and to have been oblivious of the lawful rights and interests of the vitally concerned employees. The conclusion is inescapable that the Board overlooked the salient consideration that the *National Labor Relations Act was designated by the Congress to serve as a shield and not as a shackle* to the millions of our employed whose welfare is the proper subject of national concern." (Italics ours.)

This principle was also succinctly stated by the Sixth Circuit in *National Labor Relations Board v. Vulcan Forging Co.*, 188 F. 2d 927, where the Court stated at (p. 931):

> "They (the employees) are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through a representative of their choice."

Common sense and the language of the Act itself support the conclusion that the Act has not taken from employees the right to decide for themselves when the right to represent them, which they have given to a union, is to be revoked. The only possible reason for a contrary view is one of administrative convenience. Such a rule of administrative convenience would make the rights of employees subservient to the convenience of the very government agency which has been created to protect those rights.

The Board has contended that the legislative history of Section 9(c)(3) of the Act, which prohibits the Board from holding more than one valid election in a bargaining unit in a twelve-month period, supports its view with respect to the ability of employees to revoke the authority of a Board certified union to represent them. However, this provision of the Act relates only to the holding of elections by the Board and in no wise proscribes the right of employees to revoke the authority of their bargaining agent. "The province of construction lies wholly within the domain of ambiguity" (*Hamilton v. Rathbone*, 175 U. S. 414, 419, 421). As Mr. Chief Justice Taft stated in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563:

> "Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. (Citing case.) But when, taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. (Citing cases.) Such aids are only admissible to resolve doubt and not to create it."

The language of the Act is clear. If the Congress wished to limit the right of employees to revoke the authority of their bargaining agent, it would have so provided. The Congress instead chose only to limit the right of the Board to hold elections. In any event, the legislative history of the change in the Act dealing with the holding of elections by the Board is not a support of past practices of the Board, but rather a rebuke against a practice of repetitious elections, at the request of unions after they had lost elections. The Board practice, before the amendment to the Act, was to permit a new election, regardless of the time which had elapsed since the last election, upon the mere showing that the union had obtained additional authorization signatures. (S. Rept. No. 105, 80th Cong., 1st Sess. 12, 25.) The change in the statute was never intended to deprive the employees of the right to oust an unwanted bargaining agent, but was intended to curtail the favoritism which the Board was affording unions upon their loss of elections. (Senator Ball, 93 Cong. Rec. 7683.) This is especially true in light of the amendment to the Act adopted by the Congress at the same time which guarantees to employees the right to refrain from any or all organizational activities. (29 U. S. C., Sec. 157.)

This same contention was effectively disposed of by the Third Circuit in the *Globe Automatic Sprinkler* case, *supra*, where it stated (199 F. 2d at p. 68):

> "As to the asserted Congressional approval of the one year rule, it is well settled that Congress could not be presumed to adopt an administrative construction unless it is clear, uniform and consistent and there exists 'the precise conditions passed on prior to

the re-enactment.' *U. S. v. Missouri Pacific Railroad Company*, 278 U. S. 269, 280 (1929). The same principle applies with respect to the courts. 'The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons.' *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); see also *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939)."

The Board has also advanced the argument that its rule with regard to the revocation of a union's authority is necessary to avoid industrial chaos and to preserve the stability of employer-employee relations. This rationale of the rule is absurd when an attempt is made to apply it to the fifteen employees involved in the instant case. In any event, requiring a group of employees to be represented by a bargaining agent whom they have rejected would tend to promote rather than to prevent industrial chaos. No person takes kindly to an agreement entered into on his behalf by a representative whom he has rejected.

Chief Judge McCallister of the Sixth Circuit effectively disposed of this argument in *N. L. R. B. v. Mid-Continent Petroleum Corporation*, 204 F. 2d 613, *cert. den.*, 346 U. S. 856, where he stated at (204 F. 2d at p. 622):

"Nor do we find ourselves in agreement with the proposition that the application of the ordinary rules of agency would make chaos out of the administration of the statute and prevent the protection of the rights it was aimed to secure. If employees desire to dismiss their bargaining agent and bargain directly with their employer, they may be wise or they may be foolish. But, as Mr. Justice Rutledge observed in *Medo Photo* . . . 'It is not impossible for men

to want wage increases and also to remain or become nonunion men at the same time.' Elections or designations of bargaining agents and their subsequent repudiation may not make for an orderly fashion of procedure in the world of administrative agencies. But the statute, in its provisions that employees shall have the right to be represented by agents of their own choosing, provides a democratic process, and the fact that the exercise of democratic processes in other ways, may not fit in neatly with the scheme of administrative procedure is no reason, in law, for suspending, through administrative fiat, the exercise of such choice for a period of a year, in order that the problems of employees can be worked out by the Board in what it deems an orderly fashion, whether they like it or not."

The Board has also argued that its rule follows the principle inherent in democratic processes and is analogous to popular elections. The invalidity of this analogy was conclusively demonstrated by a former Regional Attorney for the National Labor Relations Board (George Rose, "Labor Relations; Minority Rights v. Majority Rule," 37 A. B. A. Jour. (March, 1951), pp. 195-197) when he stated:

"In order to give dignity to this agency and to justify its assumption of other powers than those of representation, an analogy has been drawn between the position of the union and that of a government. This is fallacious and unwarranted, since the function of the union is not to govern but to represent the employees in negotiating an agreement which will set forth their employment relations, and is not to create a social order. This representative is chosen by an electorate which is not based on citizenship or any comparable status, but on the present holding of a

job in that particular employer, plant, craft or lesser unit. Because of the turnover in employment due to industrial factors and to the employee's personal circumstances, the composition of this unit or electorate is constantly changing. For the representative or agent to be able to force the discharge of the employee for seeking a change in representation or for nonmembership in the union, would be equivalent to the dominant political party depriving a man of his citizenship and the right to vote because he does not favor that party. An exercise of power in such fashion is obviously a totalitarian device, and is completely destructive of democratic rights. This danger is noted by the Board, although it overlooks the probability of the union alone resorting to such measures to insure its continuation in power."

Conclusion.

For the reasons stated, it is respectfully submitted that the decree of the Court below should be reversed and the petition for enforcement of the National Labor Relations Board should be dismissed.

Respectfully submitted,

FREDERICK A. POTRUCH,
ERWIN LERTEN,

Counsel for Petitioner.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own chosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * * *

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in

respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declined to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing

that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES.

Section 10. * * *.

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restrain-

ing order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be

modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE*

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INDEX

Cases:

PAGE

Statutes:

Miscellaneous:

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REASON FOR FILING THIS REPLY BRIEF

This brief is filed, pursuant to leave granted at the time of the oral argument, to reply to the brief filed on October 12th by the above-named unions as *amici curiae*. Accordingly this reply brief will be confined to their contention that the winning of a Board-conducted election by a union prevents the employees from revoking at any time the authority of the union to represent them until such authority is revoked in another election conducted by the Board.

ARGUMENT

POINT I.

The provisions of the amended Act do not make an election the sole means by which employees may rid themselves of an unwanted, certified bargaining agent.

Two of the chief purposes of the 1947 amendments to the National Labor Relations Act were to give more freedom to employees and to curtail certain powers which had been abused by some labor organizations and their officers.[1] Despite this obvious and well-known fact, the brief of the *amici curiae* seeks to construe the provisions of the amended Act to accomplish the exact opposite.

The gist of the argument of the *amici* is that because the Congress provided in § 9(c) one method by which employees might rid themselves of an unwanted bargaining agent, this method therefore became the only method for accomplishing that object. This argument, however, ignores the simple fact that Congress did not so state, either expressly or impliedly. If Congress had wished an election to be the sole method whereby employees could withdraw the authority of a certified bargaining agent, Congress would have said so. It is significant that in those instances where Congress desired certain results to flow from the certification of a bargaining representative, Congress so specified.[2]

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[1]See, *e.g.*, §§ 1, 7, 8(b), and 9(c)(1)(A)(ii) of the amended Act (61 Stat. 136).

[2]Thus, § 8(b)(4)(C) of the Act makes it an unfair labor practice for a labor organization or its agents to engage in a strike where an object thereof is forcing an employer to bargain with a particular labor organization as the representative of his employees "if another labor organization has been certified as the representative of such employees under the provisions of section 9"; and § 8(b)(4)(B) renders it an unfair labor practice for a labor organization to encourage

Further, the express language of § 9(c) shows that the Congress intended a result contrary to that urged by the *amici*. Thus the *amici* admit that, where a bargaining agent has been designated by informal means—such as by membership cards, or by a petition, or after an election supervised by some third party—the agent's authority may be revoked at will by the employees without an election at any time prior to consummation of a collective bargaining contract.[3] However, § 9(c)(1)(A)(ii) of the Act specifically authorizes an election among the employees for the purpose of revoking the authority of an uncertified agent who "is being currently recognized by their employer." Hence the *amici* are in the position of arguing that the same statutory text provides an exclusive method for revoking the authority of a certified bargaining representative and a non-exclusive method for revoking the authority of an uncertified bargaining representative. We find it impossible to follow the logic of this type of argument.[4]

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the employees of any employer to strike for the object of requiring "any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9." See also § 8(d).

[3]See pp. 21-22 of their brief where they point with approval to the same admission made by the Board on p. 23, fn. 12, of its brief.

[4]The *amici* on p. 7 of their brief say that the changes made in Board election procedure by the 1947 amendments to the Act support their argument. But the Act, as amended, makes the same changes in the election procedure under which a union seeks certification. Therefore, if we are to give credence to the *amici* argument, it would follow that a bargaining agent could be designated only by means of a Board election. But § 9(c) itself recognizes that a bargaining agent may be designated by other means. The Board also recognizes various means of selecting bargaining agents. In a recent report to Congress the Board said that the Act "does not require that the representative be selected by any particular procedure, as long as the representative is clearly the choice of a majority of the employees." *Eighteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1953*, p. 10.

It is worthy of note that § 9(c)(1) of the Act provides that the election machinery of the Board shall be utilized "*Whenever* a petition shall have been filed . . ." [Italics ours.] The use of the word "whenever" clearly shows that the filing of a petition is permissive and not mandatory. The term "whenever", used as a conjunction, commonly expresses condition or contingency, and means "if" or "in case" or "where".[5] The obvious implication of the text is that circumstances may exist to render such filing for an election unnecessary. The Act does not say that, unless a petition seeking termination of an agency is filed, a certification must continue indefinitely.[6] And the Act does not say that one year or any particular time must elapse before it is possible to revoke an agent's authority.

In various places in the Act, where Congress intended to express exclusiveness, it did so; it is therefore reasonable to conclude that, if Congress had intended to make a "de-

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[5]*People* v. *Merhige*, 212 Mich. 601, 610, where the statute read: "That whenever any person shall plead guilty . . . it shall be the duty of the judge . . ." See also *Crawford* v. *Weidemeyer*, 93 Ohio St. 461, 465, where the constitutional clause read: "Whenever the judges of a court of appeals find that a judgment . . . is in conflict with a judgment . . ., the judges shall certify the record . . ." See further, *People* v. *Melone*, 73 Cal. 574, 577, where the code stated: "Whenever any person has received moneys . . ." and where the court held that "whenever" simply meant "if". For other cases see 68 C. J. 251.

[6]Highly misleading is the opening statement in the Summary of Argument (p. 4 of *amici* brief) that the Act "provides that any time after the end of one year a certification of a union may be challenged in election proceedings . . ." The Act does not so read or provide. The Act is silent as to when employees may revoke an agent's authority. All the Act says is that no election shall be directed where a valid election shall have been held in the preceding twelve-month period. Such a negative provision may not properly be converted into an affirmative condition, as the *amici* brief would have it, that one year (or any time, for that matter) must elapse before employees may "challenge" a certification by filing a petition "to decertify the union."

certification" election the exclusive manner of revoking an agent's authority, it would have included language to that effect.[7] For example, when Congress in § 10(a) empowered the Board to prevent unfair labor practices, it added that such power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Again, when Congress in § 10(e) granted enforcement powers to the courts of appeals of the United States, it had no trouble in providing that, "The jurisdiction of the court shall be exclusive. . ."[8]

Revocation of bargaining authority without an election does not conflict with the remedy of an election. Nothing in the Act disables the employees from revoking an agency without going to the Board for an election. The employees can use the election procedure, if they wish, after one year. But they are not obliged by the statute to do so, either during or after one year. The authors of the 1947 amendments clearly did not intend to take away the pre-existing right of employees to create or to cancel the authority of a bargaining agent. To the contrary, the amendment to § 7 confirmed all employee rights, in their negative as well as

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[7]The term "decertification" does not appear in the Act. It is used, however, in the Board's regulations. (Sec. 101.17, Code of Federal Regulations, Title 29—Labor, Chapter II—National Labor Relations Board, Part 101—Statements of Procedure; and Sec. 102.53 (c), *Ibid.*, Part 102—Rules and Regulations, Series 6.)

[8]Instances could readily be multiplied in many other federal statutes. For example, § 105 (a) of the Renegotiation Act of 1951 (65 Stat. 12) provides that in the absence of the filing of a petition with the Tax Court, the Board's order "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Sec. 108 of the same Act (65 Stat. 21) provides that, upon the filing of a petition for redetermination with the Tax Court, "such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ."

positive aspect, by expressly adding that employees shall have the "right to refrain" from collective bargaining. If the majority of the employees find it practicable to sign a document of revocation and to deliver it to the agent and to the employer, and if this is done without any unfair labor practice in inducing it and prior to the signing of any contract with the employer, there appears no reason and no statutory prohibition against such method.[9]

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[9]The thesis of the *amici* that a certification must stand until revoked by a Board election would lead to anomalous results. Sec. 9(c)(1)(B) provides that, in cases of petitions for elections of all kinds, an election may be directed only if the Board first finds the existence of a "question of representation." Thus, if a union, certified perhaps four years previously, disclaimed interest and thereby caused the dismissal of a "decertification" petition—since there would be no "question of representation"—the same union, under the *amici* interpretation of the statute, could at any time thereafter require the employer to bargain collectively, inasmuch as it would still be the certified agent and would not have been "decertified" in a Board election. If the Board under such circumstances of disclaimer declared the old certification relinquished, the *amici*, to be consistent, would be compelled to argue that such action by the Board exceeded its statutory powers. Another anomaly would also be bound to arise under the *amici* theory of the law:—They find, so they say on p. 22 of their brief, nothing in their theory inconsistent with permitting an employer to refuse to honor a certification where the union has become defunct or a schism has occurred obscuring the union's identity. But, if the *amici* were correct in their theory (as expressed on p. 22 and *passim* in their brief)—that, until a decertification election is held, "the employer must continue to bargain with a certified union"—no such exceptions would be permissible because the statute would be inflexible and no exception would be contained therein.

POINT II.

The legislative history of the Act does not show that Congress intended an election to be the exclusive method for revoking the authority of a certified bargaining representative.

Although it is axiomatic that resort to legislative history is to be had only when the statute is ambiguous, let us nevertheless, and despite the clarity of the provisions under discussion, turn to the legislative history. We shall find that it does not say what the *amici* would like to have it say.

Their brief (pp. 8-9) makes much of the decision in 1930 in *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548. And they picture Senator Wagner as "repeatedly referring" to that case as establishing the doctrine that a representative status cannot be terminated except by an election. These things are just not so.

This Court, in the cited case, did not affirm on the basis stated at the top of page 9 of the *amici* brief. This Court accepted the concurrent findings of fact of the two courts below that the carrier had "interfered" with the right of the employees to designate the Brotherhood (Railway Labor Act of 1926, 44 Stat. 577, § 2, subd. Third); and then this Court passed on the question of law whether the statute imposed a legal duty upon the carrier not to "interfere", that is, an obligation enforceable by judicial proceedings. That was the whole case, and it had nothing to do with the issue now at bar.

The citations in the *amici* brief (p. 9, fn. 5) to certain statements by Senator Wagner are likewise not persuasive. Senator Wagner did not discuss at all the question of the

right of employees to withdraw the authority of a bargaining agent, or the question of the duration of a certification or of a representative status. All the Senator did was to cite the *Texas* case and mention the terms of the contempt decree of the District Court. Then he quoted from the Supreme Court's opinion as upholding the legality of collective action in designating representatives free from interference by the employer. And that was all.

The *amici* brief (pp. 16-17) also makes much of the dropping in conference of the provision in the 1947 House bill excepting from the twelve-month limitation an election upon a petition to withdraw bargaining authority. Such action, however, on the part of the conferees was not for the purpose of preventing a revocation under any and all circumstances but, as shown in petitioner's main brief (p. 10) and in the *amicus* reply brief of the Genesee Foundry Company, Inc. (pp. 9 and 12), was for the purpose of eliminating elections of all kinds in excess of one a year. This is readily understandable because of the possibility that under the House bill repeated petitions for "decertification" elections could have been filed during the year—a situation that might have led to an abuse akin to that which Congress was seeking to cure, namely, too frequent elections at the instance of the losing party. The contention of the *amici* that by omitting this House provision the Congress intended to prevent employees from ridding themselves of an unwanted agent for a year by any method whatever, is to prove too much; the same contention would also overlook and obliterate the amendment to § 7 of the Act recognizing the right of employees to refrain from collective bargaining.

This leaves only the remarks of Senator Taft, quoted by the *amici* (p. 17 of their brief). These remarks are wrenched from their context; when read in their setting they reveal no such meaning as the *amici* intend. Indeed, the meaning that the *amici* would read into Mr. Taft's statements is contrary to his whole philosophy. When read in context these remarks fall into their natural proportion and association in support of Mr. Taft's point that raids by rivals against an incumbent union, and oft-repeated elections at the instance of a losing but hopeful union, would be discouraged if elections were limited to not more than one a year. For ready reference we quote in the footnote the context of Senator Taft's remarks.[10]

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[10]Senator Taft was engaged in making a comprehensive statement on April 23, 1947, regarding the Senate bill (93 Cong. Rec. 3954). In the course of his statement he said:

"Mr. President, one of the matters which created the greatest complaint in the early days, and still does, is conduct of elections by the National Labor Relations Board. An election under present law may be sought only by a union. In the early days the Board exercised its discretion in favor of particular unions. It would not order an election until the union told it conditions were favorable, and it might win. Many of the greatest abuses on the part of unions occurred in the use of that discretionary power by the Board in the early days.

"Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees. Sign this agreement, or we strike tomorrow.' Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I want an election. I want to know who is the bargaining agent for my employees.' Certainly I do not think anyone can question the fairness of such a proposal.

"We provide, further, that there may be an election asked by the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union. An election under this bill may be sought to decertify a union and go back to a nonunion status, if the men so desire.

"It is provided that where there is a ballot having three proposals on it, the AFL union, the CIO union, and no union at all, the two

POINT III.

Contrary to the claim of the *amici*, the courts have not construed § 9 (c) of the amended Act "as providing the sole method of questioning a certified union's continued status as bargaining representative."

The *amici* invoke *Labor Board* v. *Mexia Textile Mills*, 339 U. S. 563, as determinative of the present issue. We read that case quite differently.

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highest shall be certified in the run-off. Under existing conditions if, we will say, the AFL has the highest number but not a majority, the no-union has next, and the CIO union, third, the Board says that since the AFL and CIO together had a majority of the total, therefore the men want a union, and they do not put on the ballot the no-union proposal which was second in number of votes cast, they simply put the AFL and the CIO on it.

"This bill requires them to pursue the policy that has been pursued in every run-off election I know of—the two highest have to be certified in the run-off. The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for 1 year. He remains the bargaining agent until the end of that year.

"The bill provides further that in these elections, and otherwise, there shall be equal treatment of independent unions. Today the Board refuses as a rule to certify an independent union. Most of the independent unions had some cloud on their original formation.

"Originally, perhaps they were a company union, or they had some aid from the company. The Board has taken the position that if those facts are once shown, they never will certify such a union, although it may have purged itself of that connection for the last 10 or 15 years. The telephone union was originally a company union. Now, nobody can question it is bona fide.

"If there be an AFL or CIO affiliate union which is company dominated, but which affiliates itself with the national AFL union, then the Board will permit it to purge itself promptly and will certify it as bargaining agent.

"This bill provides that it must give independent unions, under those circumstances, the same treatment that would be given a union affiliated with the AFL or the CIO. Numerous representatives of independent unions appeared before the committee who told us how unfairly they had been treated. It was felt that theirs was a good case."

In the first place, the issue now at bar was not presented, briefed, or argued in the *Mexia* case.

In the second place, the employees in *Mexia* had not revoked their agent's authority.

In the third place, this Court's opinion in *Mexia* evidenced a purpose to prevent an employer, guilty of unfair practices, from playing "hide-and-seek" by merely alleging a doubt as to the majority status of the union.

In the case at bar there was an affirmative and authentic revocation of the agent's authority, and there was no unfair labor practice by the employer.[11]

POINT IV.

If adopted, the theory of the *amici* would inevitably cause injustice both to employees and to employers. The amended Act requires no such interpretation.

It needs little demonstration to show the injustice to employees if they were to be utterly unable by any method for a year, or for any period, to revoke a certified bargaining agent's authority. Events and discoveries may occur within 24 hours after an election, making imperative in the eyes of the employees the termination of the agency. Where the majority of the employees so express themselves in authentic fashion, as in the case at bar, public policy would indicate that their desire be recognized. Otherwise, collective bargaining becomes not a shield but a sword. Assuming *arguendo* that a kind of stability might be

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[11]Little purpose would be served by analyzing in detail the cases from certain circuits, cited on pp. 19-20 of the *amici* brief. Suffice it to say that each of these cases on its facts is distinguishable from the case at bar, and that the excerpts therefrom, quoted by the *amici*, stem from *Mexia*.

achieved under a doctrine of enforced agency, it would not be a salutary stability. Larger considerations of freedom, albeit more fluid, emerge as the wise policy long-range.

The injustice of the *amici* thesis to employers is almost equally apparent. When an employer sits down to bargain, or when he encounters grievances from time to time in his plant, he is entitled to discuss matters with a man who truly represents the employees. The employer needs to be assured that any arrangement reached with the representative as to any of the myriad subjects of collective bargaining will be respected by and receive the support of the employees. It is easy to see how confusion and all sorts of labor disturbances would be the order of the day where, instead of intimate and amicable relations between the employees and their agent, there would exist friction and hostility. Moreover, an honest employer is entitled to an honest bargaining representative of his employees. An employer should not be forced to bargain with a man who possibly had been exposed as a Communist or a criminal or even a questionable individual whom the employees themselves had repudiated.

The ultimate issue does not revolve around considerations of "reasonable period" or the longevity of a "certification." The issue is a very high one.

Respectfully submitted,

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INDEX

Cases:

Statutes:

PAGE

Miscellaneous:

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BRIEF OF AMICUS CURIAE
(Genesee Foundry Company, Inc.)

INTEREST OF AMICUS CURIAE

The Genesee Foundry Company, Inc., a New York corporation employing about 90 employees at its manufacturing plant in Syracuse, is respondent in a proceeding pending before the National Labor Relations Board in Washington, D. C., involving facts similar in important respects to those in the case at bar.

In *Genesee* the intermediate report of the trial examiner states that the company wrongfully refused to bargain with a certified C.I.O. union despite the fact that a majority of the employees in the bargaining unit had expressly repudiated the union on September 28, 1953, which was three

months and four days after its certification. Such revocation of the union's bargaining authority took place after a series of negotiating conferences had not resulted in a contract with the company. The rejection of the union took the form of individually signed cards, whose authenticity was conceded, whereby a majority of the employees authorized an A. F. of L. union to be thereafter the bargaining representative, each card expressly stating that such authorization "supersedes any power or authority heretofore given to any person or organization to represent me . . ."

The company duly filed exceptions and a brief with the Board in Washington on March 31, 1954. The Board has not as yet handed down its decision.

Although the employees in *Genesee* repudiated the union more than three months after its certification, whereas the employees in the case at bar did so one day prior to certification (being seven days after an election), it is believed that the decision of this Court in the case at bar may well bear intimately upon the issues in *Genesee*.

SUMMARY OF ARGUMENT

Under the common law a collective bargaining agency is revocable at any time, and there is nothing in the National Labor Relations Act which in any way diminishes that principle. In fact, the Act expressly recognizes the right of employees to refrain from bargaining collectively. The Labor Board's so-called "one-year certification rule" is, in reality, not a rule but a gloss, often disregarded by the Board itself, and, when applied, amounts to an amendment of the Act, contrary both to its spirit and its text.

ARGUMENT

POINT I.

THE COMMON-LAW PRINCIPLES OF AGENCY ARE APPLICABLE TO REVOCATION OF A UNION'S BARGAINING AUTHORITY.

It is sometimes claimed that the legal concepts of principal and agent have no application to the relationship between employees and the union chosen by them to bargain with their employer. Those concepts, so the argument runs, are rooted in an era less "dynamic" than the present, and are alien to the modern burgeoning of "labor law."

However, those concepts are not to be swept aside as anachronistic in the labor field. They are very much alive and lend themselves to realistic application here as elsewhere.

Collective bargaining was not a creation of the Wagner Act, but was recognized by the courts long prior thereto. (*Amer. Foundries* v. *Tri-City Council*, 257 U. S. 184, 209.) The right of employees to select representatives of their own choosing for collective bargaining has been held to be "a fundamental right", which the Wagner Act "goes no further than to safeguard." (*Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 33.) Indeed, irrespective of the statute, this Court has said that, "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." (*Idem.*) In a subsequent opinion (*Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, 263) this Court (*per* Mr. Chief Justice Hughes) cited the foregoing cases and stated that,

"Neither this provision [§ 7 of National Labor Relations Act], nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing." The Court added (p. 264) that it was "in recognition of this right" that Congress enacted the National Labor Relations Act.

Section 9(a) of the Act establishes the principle that a majority of the employees in an appropriate unit may bind the minority in designating or selecting a bargaining representative. In other words, the Act renders the representative, chosen by the majority, to be the representative of every employee in the bargaining unit. And the representative, when so chosen, must represent all employees in the unit with impartiality and with all the fairness and justice required of any agent. (*Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood*, 323 U. S. 210.) As stated by this Court in *Wallace Corp.* v. *Labor Board*, 323 U. S. 248, 255:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially."

See also, *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.

Is there anything in the Act which renders the agency, so created, irrevocable for any period? We believe not.

In the first place, the Board's mere certification of a bargaining representative does not, under the Act, effect

a status beyond recall. A certification under § 9 (c)(1) is merely a piece of paper certifying the result of an election conducted by the Board (General Counsel's Ex. 4; R. 30, 39). A certification is not in any sense a license or a prerequisite to bargaining, because employees may select a union without an election and the employer may recognize the union either on the basis of cards signed by the majority, or on the basis of other appropriate evidence submitted to him. A union so recognized is entitled to the protection of the Act and may, without any certification, lawfully contract with the employer. (See, *e.g.*, *Detroit Michigan Stove Company*, 51 NLRB 347; *Great Lakes Carbon Corporation*, 44 NLRB 70; *General Box Company*, 82 NLRB 678, 686.) Moreover, the holdings are numerous where the Board has ordered an employer to bargain, without an election and its resulting certification, when the employer had raised objections in bad faith to reasonable proof of authority tendered by a labor organization which a majority of his employees had actually designated as bargaining representative. (See, *e.g.*, *J. C. Lewis Motor Company, Inc.*, 80 NLRB 1134, enforced, 180 F. 2d 254.)

In the second place, the statutory provision (§ 9 [c] [3]) forbidding the Board to direct an election in any bargaining unit within which, "in the preceding twelve-month period", a valid election has been held, is obviously not a guaranty that a bargaining representative's authority cannot be revoked at any time by the express will of the majority of the very employees who first clothed the representative with authority. To be sure, such employees would be unable for twelve months to have the Board hold another election, but nothing in the cited provision of the Act forbids the employees to revoke a union's authority at any time, or makes it an unfair labor practice for an employer

to refuse to bargain with a union whose authority has been so revoked.

In the third place, the provision in § 9 (c)(1) of the Act, relating to the Board's power to direct an election whenever a petition has been filed "alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a)", is obviously not intended as the exclusive method for revoking a representative's authority. If Congress had intended such machinery to be the sole means of revocation, it would have so provided. Congress did not, as we have seen above, make an election and certification the only means of conferring authority to bargain collectively. (In fact, the provision just quoted envisages a situation where the bargaining representative is "currently recognized" but not "certified.") Likewise Congress has not sought to make an election the only method of revocation of bargaining authority. By including this section Congress guaranteed a means, especially practicable in large plants, for terminating a bargaining agent's authority. But there is nothing in the section to warrant the conclusion that every bargaining agency is irrevocable until there has been an election so resulting. The section makes no attempt to eliminate common-law methods of terminating an agency. And this is readily understandable because common-law methods are often more feasible in smaller plants, and less expensive to the taxpayers, than the cumbersome mechanics of a Board election.

Not only is there nothing in the statute making the agency irrevocable for any given period, but there is af-

firmative language in the 1947 amendments to the Act indicating that Congress intended that, equally with legislative recognition of the pre-existing right to bargain collectively, there should be statutory recognition of the right to refrain from bargaining collectively (§ 7). It would appear to follow that the right of the majority to refrain from bargaining collectively could be expressed at any time and, when so expressed, should prevail over the desire of the agent to have his authority continue.

Finally, under the facts at bar, there is no principle of common law barring the revocation of the agent's authority. The agency had not been executed, no contract with the employer having been signed. Nor had the power been given to the agent as security. Nor was the power coupled with an interest in its subject-matter. The possibility that a union might enjoy a check-off of membership dues under a future contract is not such an interest as would render the agency irrevocable, first because a check-off does not inhere in the power but would accrue, if at all, only after exercise of the power; and second because the agent's right to or his expectancy of compensation is never a bar to revocation of his authority. (2 Am. Jur., "Agency", §§ 77-84; 2 C. J. S., "Agency", §§ 73, 75; Restatement, Agency, §§ 118, 138-139; Civ. Code of Calif., Sec. 2356; *Graham* v. *Southern Ry. Co.*, 74 F. Supp. 663.)

A union as such does not acquire a vested interest in its representative capacity. The status of a union as such is strictly for the benefit of the employees, the whole spirit of the Act reflecting the protection of the rights of employees and not the conferring of benefits upon labor organizations as such. Indeed, this Court has pointed out that, under the Act, it is not essential that a labor organization be the

bargaining representative. The representative may be an individual. (*Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.) But whether the representative be an individual or a labor union, the Act contemplates that the representative have an eye single to the benefit of the employees. Since the Act is cast in terms of employee-protection, what greater irony could there be than its construction as requiring the retention of an unwanted agent?

POINT II.

THE BOARD'S "ONE-YEAR CERTIFICATION RULE" IS NOT A RULE BUT A VARIABLE DOCTRINE OF CONVENIENCE; BUT, VIEWED AS A RULE, IT WOULD EXCEED THE BOARD'S POWER BECAUSE CONFLICTING WITH THE ACT.

The Board on occasion refers to its "one-year certification rule," namely that, absent special circumstances, a certification binds the employees for "a reasonable period." This "reasonable period", where there is no bargaining contract, extends, says the Board, for one year from the certification date. (NLRB, Fourteenth Annual Report, 1949, pp. 22-23.)

However, no such "rule" has ever been promulgated as part of the Rules and Regulations of the Board. In reality this "rule" is merely an alleged doctrine, announced in certain Board decisions. But those decisions are so variable and inconsistent that it is impossible to escape the conclusion that there is no genuine doctrine on this score, other than one of convenience changing at the Board's will with the varying circumstances of each case.

The evanescent character of this doctrine is demonstrated by the fact that the Board finds nothing in the Act to prevent a holding that, where there has been no Board-conducted election, the employees may repudiate the bargaining representative at any time, in the absence of unfair labor practices which may have influenced the repudiation. (*Frigo Brothers Cheese Corp.*, 50 NLRB 464, 473. [In *Frigo*, as in the case at bar, the repudiation occurred within a week after the grant of authority to the agent.] See also, *National Labor Relations Board* v. *Mayer*, 196 F. 2d 286, 289-290.)

Nor has the Board hesitated to brush aside a certification within one year where a certified union dissolved or where, owing to a schism in the union or a defection of substantially the entire membership, the continued existence of bargaining authority fell into doubt. (*Public Service Electric and Gas Company*, 59 NLRB 325 [agency terminated after two months]; *Swift & Company*, 94 NLRB 917 [agency terminated after seven months].) Indeed, the Board in numerous cases of defection, schism, or transfer of allegiance has not allowed even a current contract to stand in the way of the termination of the agency. The Board has also said that, "We see no valid reason for giving more weight to a certification than to a contract under such circumstances. The certification of a collective bargaining representative by the Board is but the prelude to the making of an exclusive bargaining contract, the ultimate goal in the stabilization of labor relations." (*Carson Piric Scott & Company*, 69 NLRB 935, 938.)

Nor has the Board felt bound by a certification where within twelve months the employees transferred affiliation from one union to another. (*Brightwater Paper*

Company, 54 NLRB 1102 [agency terminated after two months]; *Carson Pirie Scott & Company*, 69 NLRB 935 [agency terminated after two months]; *Jasper Wood Products Company, Inc.*, 72 NLRB 1306 [agency terminated after three months].) If the Board is not impressed with the sanctity of its certification where employees change within a few weeks from one union to another union, why should a certification be held to prevent the majority of the employees from revoking an agency and refraining from bargaining collectively?

Nor has the Board felt bound by a certification where, within one year, it was demonstrated that a substantial reduction of personnel had resulted because of the employer's transition from war to civilian production. (*Electric Sprayit Company*, 67 NLRB 780 [personnel reduced about three weeks after certification].)

Nor has the Board felt constrained by a certification where the number of employees in the bargaining unit doubled or quadrupled within the "certification year." (*Westinghouse Electric & Manufacturing Company*, 38 NLRB 404; *Celanese Corporation of America*, 73 NLRB 864.)

The foregoing are deemed by the Board to constitute "unusual circumstances," which permit the termination of the agent's authority within less than one year from the date of certification. But we believe that a "rule", which is thus shot full of exceptions and unpredictable variations, does not possess the stability, uniformity, or consistency that would give rise to an "administrative construction," even assuming a statutory ambiguity which is not present. And, even if the "rule" were less mutable than it is, the Board exceeds its power in inventing a gloss which is tanta-

mount to a statutory amendment contrary to the philosophy and text of the Act as it came from the hands of Congress. Assuredly, when the Board forbids the majority to revoke the agency, the Board denies the right of the employees to refrain from collective bargaining, a right explicitly recognized in § 7 of the Act.

The case at bar is not like *Frank Bros. Co.* v. *Labor Board*, 321 U. S. 702, or *Medo Corp.* v. *Labor Board*, 321 U. S. 678, where the defection in union ranks was caused by the employer's unfair labor practices and where the employees had not revoked their designation of a bargaining agent.

In concluding this brief we submit that it is contrary to the spirit and intent of the National Labor Relations Act—it is contrary to the traditions of this nation—to prevent a majority from ending an agency they no longer desire. What momentous principle requires that they cannot revoke such agency? If the employees do not wish longer to leave their economic welfare in the hands of a given bargaining agent, why shouldn't they be permitted to revoke the agency? The agent has no vested interest which the principal cannot disturb. Certainly the National Labor Relations Act compels no such peonage.

CONCLUSION

The decree of the Court of Appeals herein should be reversed and the petition of the National Labor Relations Board for enforcement of its order should be dismissed.

Respectfully submitted,

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Amicus Curiae.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

* * * * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and

proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF AMICUS CURIAE
(Genesee Foundry Company, Inc.)

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INDEX

Cases:

PAGE

Statutes:

Miscellaneous:

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REPLY BRIEF OF AMICUS CURIAE
(Genesee Foundry Company, Inc.)

The entire brief for the National Labor Relations Board is based upon the theme, repeated over and over, that the "one-year rule" is a valid "accommodation" between, on the one hand, freedom to refrain from collective bargaining and, on the other hand, "stability in industrial relations." Out of this thesis of "accommodation" between liberty and stability proceeds all the argumentation, clothed in varied phrase, set forth in the Board's brief.

This philosophy of "accommodation", siren to the ear, can assume a sinister aspect when imported into either political or jurisprudential thinking. To be sure, compromise and adaptation are often desirable solutions of problems which admit of such treatment. And even liberty may

on occasion be checked by government when its abuse would trample another man's rights. But never should it be forgotten that the love of freedom is the spirit that has made this country. The convenience of administrative bureaus, the ambition of bargaining agents, the fancied stability of status, weigh light indeed when freedom is in the balance.

The Board, pushing into the shadow the human liberty of employees, paints a subtle picture of stability, repose, and "subordination of employee sentiment." The Board's entire approach, exemplified throughout its brief, is one that is as old as history and one that has been the harbinger of many an ancient disaster.

There were once many Athenians who desired to "accommodate" with the Macedonians, especially after the defeat of Thebes. But Demosthenes, in his speech On the Crown, recalling the glories of Salamis, praised the Athenians of that earlier day who "looked not for an orator or a general who might help them to a pleasant servitude: they scorned to live, if it could not be with freedom."

Another immortal statesman, Edmund Burke, also had something to say on the subject of an "accommodation" with freedom. With eloquent irony, in his Speech on Conciliation with the Colonies, he told the Commons that:

> "Perhaps a more smooth and accommodating spirit of freedom in them [the colonists] would be more acceptable to us. Perhaps ideas of liberty might be desired, more reconcilable with an arbitrary and boundless authority. Perhaps we might wish the colonists to be persuaded, that their liberty is more secure when held in trust for them by us (as their guardians during a perpetual minority) than with any part of it in their own hands."

The employer here is a small employer. There is not even a score of employees. But imbedded in this case is a great principle, the cause of economic liberty itself. What is at stake is the liberty of a group of men to take back an agent's power to make a contract affecting their very livelihood and the conditions of their daily work. Government cannot touch a man more closely than this. These are truly among the freedoms most jealously held, and among the chief advantages worth living for.

Congress has not said that this freedom should no longer exist in the United States. It is the Board which has invented this so-called rule of "accommodation"—a "poisonous gloss", as Coke once expressed it, "which corrodes the vitals of the text." (11 Coke, 34.) And, in point of actual fact, there is not even any language in the statute which the Board is here seeking to interpret. The Board's position is simply that it does not want employees to revoke a bargaining agency for a year after the Board has gone to the trouble of holding an election. But this is not the law. This is mere administrative desire and convenience. The Board has no cause to feel aggrieved if, for reasons cogent to the employees, they lose confidence in their bargaining agent and repudiate him before he signs a contract. The Act was not passed to benefit the Board. On the contrary, when Congress was amending the Act in 1947 and seeking to correct some of the abuses which had arisen "as a result of labor laws ill-conceived and disastrously executed",[1] this is what Congress had to say: "In other words, when Congress grants to employees the right to engage in specified

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[1]H. Rep. No. 245, 80th Cong., 1st Sess., p. 3.

activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so."[2]

The issue in this case is not, as envisaged by the Board (p. 10 of its brief), whether employees should be permitted to choose representatives at will after the signing of a contract; the issue is not whether a rival union or an employer may "challenge" a certification within a year; it is not whether an employer can escape bargaining for a year by claiming a doubt as to the union's majority; it is not whether a new election may be had within a year. *The issue is whether the holding of a Board-conducted election prevents a majority, before execution of a contract, from revoking the agency and refraining from collective bargaining.*

The Board expressly admits that where the majority has designated a bargaining agent by means of cards or a petition, or the like, then "the employees may repudiate their representative at will at any time prior to the consummation of a collective bargaining agreement" (p. 23, fn. 12, of Board's brief). But the Board goes on to claim that, if the designation of an agent is by means of a Board-conducted election, all this is changed and the employees are shackled for a "reasonable period, usually one year." In other words, if the employees call upon the Board to conduct an election, they are unable thereafter for an entire year to be rid of an unwanted agent, even though no contract with the employer has been signed. On the other hand, if the employees designate a bargaining representa-

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[2]H. Rep. No. 245, 80th Cong., 1st Sess., p. 27, anent the amendment to § 7 of the Act guaranteeing to employees "the right to refrain from any or all of such activities:" Even the House Minority Report was forced to admit that the right to refrain is a "fundamental" and "natural right that exists and existed prior to passage and independent of the National Labor Relations Act." (H. Minority Rep., *Ibid.*, p. 75.)

tive by cards or by a petition, they can revoke the agency at will. We are unable to perceive any justification for such a distinction. Assuredly, the removal of an agent who has, let us say, proved faithless, should not depend upon whether he was originally designated by a petition or by means of a Board election.[3]

In recent practice, the Board has even gone to the extreme of insisting that, where there has been a Board election, a "union's representative status is *conclusively* presumed for at least 1 year following certification." [Italics in original.] (*Jersey City Welding & Machine Works, Inc.*, 92 NLRB 510, 511.) And the Board has even ordered an employer to bargain where every employee in a bargaining unit of approximately 30 persons had repudiated the union in writing, without any unfair labor practice, three weeks before the expiration of the magic year. Fortunately, however, the Court of Appeals, 3rd Circuit, set this order aside. (*National Labor Rel. Bd. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64.) The cited case is one of those listed in the Board's brief (p. 26, fn. 13) as in accord with its "one-year rule." We read the case quite differently. Moreover, we do not read any of the judicial decisions from other Circuits, cited by the Board, as going to the extremes asserted in the Board's brief.[4]

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[3]Recently the Board reported to Congress that the Act "does not require that the representative be selected by any particular procedure, as long as the representative is clearly the choice of a majority of the employees." *Eighteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1953*, p. 10. If that be so, it is difficult to understand the Board's position that the selection of an agent by an election results in loss of power for a year to remove the agent, but a selection by other permissible means does not result in the loss of liberty to remove a representative who has fallen into disfavor.

[4]Repeatedly in its brief the Board seeks to convey the impression that practically every court has held in favor of its contentions in the

The history of the "one-year rule" is most instructive. In the early days the Board gave full recognition to the wishes of the employees under facts identical with those at bar. Thus, in *New York and Cuba Mail Steamship Company*, 2 NLRB 603, after an election won by union A, and prior to its certification, a majority of the employees signed cards for union B. There was no unfair labor practice. The Board ordered another election, saying (at p. 605): "In a case like this, where prior to the Board's certification of the results of an election there is an apparent change in the wishes of a majority of the men, we believe that another election should be held."[5]

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case at bar. This is just not so. We call attention to the analysis of these judicial decisions in the opinion of McAllister, C. J., in *Mid-Continent Petroleum Corp.* v. *National Lab. Rel. Bd.*, 204 F. 2d 613, cert. denied 346 U. S. 856.

[5]The Court should not be misled by the argument on pages 10 and 29-30 of the Board's brief that the employer here is contending for a rule that would be disruptive of the proper administration of collective bargaining contracts. In the first place, the employees here revoked the agency before any contract was signed. Secondly, we do not urge that an agency can be revoked after the agency has been executed by consummation of an agreement with the employer. And thirdly, we call attention to the principle early established by the Board, and certainly a fairer one than now advocated by the Board, namely that, "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, *while at the same time continuing the existing agreements under which the representatives must function.*" [Italics supplied.] (*New England Transportation Company*, 1 NLRB 130, 138-139. See also *First Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1936*, pp. 108-109. To same effect see *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, pp. 118-119.) Even more specifically, the Board has pointed out in a well-considered case that no practical difficulties, such as today are conjured up, are really present. In that case the Board held: "Consequently, in this case, whichever organization is chosen as representative of the employees for the purposes of collective bargaining will be free to continue the existing agreement, to bargain concerning changes in the existing agreement, or to follow the procedure provided therein for its termination." (*Swayne & Hoyt, Ltd.*, 2 NLRB 282, 287.)

But, as time went on, the Board began to get cases where an employer sought to escape bargaining by claiming that, because of shrinkage of the work force or for some other reason, he "doubted" that the certified union still represented a majority. The Board met such resistance by holding that a certification cannot be challenged "upon the whim of the employer" for a "reasonable period after its issuance."[6] However, this approach was later carried to extremes and finally culminated in a Board decision that a decertification petition filed within one year of a court decree enforcing a bargaining order would be dismissed, notwithstanding the lapse of almost 5 years since the union's certification.[7] The Board in that case even went so far as to institute contempt proceedings against the employer, but the Court of Appeals, 5th Circuit, held as follows:

> "In view of the facts shown in respondent's answer and not denied by the Board, that the certification was made in 1946, nearly six years ago, and that the present employees do not want the union to represent them, and of the Board's persistence in refusing to take any steps by either decertification proceedings or otherwise to give the present employees an opportunity to select their own representative, we are in no doubt that no probable cause has been shown for the belief that respondent has contumaciously refused to bargain in good faith or that a further inquiry into the charge of contempt would be justified."[8]

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[6] *Fifth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1940*, p. 61, citing *Woodside Cotton Mills Company*, 21 NLRB 42.

[7] *Sixteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1951*, p. 83. This was the case of *Aldora Mills*, 10-RD-78.

[8] *National Labor Relations Board* v. *Aldora Mills*, 197 F. 2d 265, 267.

Within the next year or two the Board began to impose a rigid restriction of one year. That was the method employed by the Board to check frequent requests from rival unions to hold elections to oust incumbent unions. In turning down such requests, the Board expressly stated that its policy was based upon "administrative reasons."[9]

On the other hand, where an election was lost by a union, the Board did not hesitate to order further elections within the year at the instance of the losing but still hopeful union.[10] Inasmuch as a petitioning union needed merely to show to the Board's regional director that it possessed cards from 30% of the employees, it was not difficult, even for a union which had lost an election, to obtain another one shortly thereafter. This 30% showing was developed by the Board as an administrative practice.[11] On occasion this practice was "relaxed" even down to an 18% showing.[12]

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[9]"Ordinarily, the Board refuses for administrative reasons to entertain a petition for investigation and certification of representatives within 1 year after the issuance of a Certification." *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, p. 56.

[10]The Board said that it would order such elections within the year so as not "to perpetuate a condition in which the opportunity for collective bargaining is restricted." *Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943*, p. 47, citing *General Aircraft Corporation*, 49 NLRB 916; *Packard Motor Car Company*, 47 NLRB 932; *Briggs Indiana Corporation*, 49 NLRB 920; and *Ford Motor Company*, 47 NLRB 939; 946.

[11]*Tenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1945*, p. 16, fn. 7, citing numerous Board decisions. See also *Eleventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1946*, p. 10, fn. 5; *Fifteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1950*, p. 31; *Seventeenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1952*, p. 29.

[12]*Ibid.* The 30% practice was subsequently embodied in the Board's Rules and Regulations, Sec. 101.17, Code of Federal Regu-

The abuse of repeated and frequent elections at the instance of losing unions was corrected by Congress in 1947 by the addition of § 9(c)(3) restricting elections to one a year.[13] The Board admitted that this amendment created a change in its prior practice.[14]

A few words should be said with reference to the Board's comparison of its elections for choice of a bargaining agent to popular elections for members of Congress or to elections of officers in private clubs (Board's brief, pp. 11, 24-25, 31-32, 39).

In the first place, it should be noted that the quotations (Board's brief, pp. 24-25) from the Senate and House Reports on the original Wagner bill, as to "an election in a democratic society", are torn from their context and thereby convey an impression wholly different from the intent of the authors of those Reports. The Board would have us believe that these passages support the teaching that an agent chosen at a Board election must be permitted, irrespective of the wishes of the employees, to function "for a reasonable time" or, in plain language, for one year.

But these excerpts from the Senate and House Reports in May and June, 1935, have nothing to do with the Board's

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lations, Title 29—Labor, Chapter II—National Labor Relations Board, Part 101—Statements of Procedure.

[13]Senator Ball, in debating the Taft-Hartley bill on June 23, 1947, pointed out that there were instances where the Board had held elections as many as three or four times in a single year. (93 Cong. Rec. 7683.) The Senate Report was equally explicit as to the purpose of Congress in limiting the number of elections. (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25.)

[14]" . . . it [§ 9(c)(3)] creates a prohibition against holding a second election within the same year after a valid election lost by a union, where the election does not result in a certification." *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, p. 31. See also *Fourteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1949*, p. 25.

thesis. Thus, the Senate Report, to the effect that an election would be of little worth if thereafter its result were for all practical purposes ignored, referred to imposing by statute an affirmative duty to bargain. The Board's brief omits the important sentence in the quotation from the Senate Report, namely that: "Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.) The writers of that Report were dealing entirely with the reason for including in the bill a "fifth unfair labor practice", to wit, a refusal by an employer to bargain collectively. A reading of the Report shows no intent to indicate that the mere holding of a Board election should operate to prevent "for a reasonable time", or for any time, the employees from ridding themselves of an agent who was no longer *persona grata.*

Nor does the Board's quotation from the House Report on the original Wagner bill (Board's brief, pp. 24-25) support the Board's position. When this excerpt is read in context it is seen to refer to the holding of an election so as to avoid a possible strike. The Report deals with a situation where a union has requested recognition but the employer has refused to bargain. Under such circumstances, says the Report, "the Board should not be required to wait until there is a strike or immediate threat of strike." Hence, the Report goes on to say, this is the type of "potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections." (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 22-23.) The authors of the Report were not advocating an iron-clad rule prohibiting employees from revoking an agency whenever such agency happened to have been created by a Board election.

And perhaps this is the place to emphasize that the revocation of the agent's authority in the case at bar would not prevent the majority of the employees, at any time thereafter, from designating the same or another agent by cards or other suitable means, whereupon the employer would be required to recognize such agent. To be sure, by statute there could not be another election for a year, but this fact would not prevent the employees from requiring collective bargaining if they so desired; and the employer would refuse at his peril if a union, with cards from a majority, demanded bargaining negotiations.[15]

As to the Board's view that the choice of a bargaining agent at a Board election is analogous to the election of a member of Congress or to the election of the president of a social club, there would seem to be no need for extended discussion. A bargaining representative is a private agent for a special private purpose; a member of Congress, on the other hand, represents all the people, including the smallest infants, for the sovereign purpose of government, *i.e.*, for purposes of penal legislation, foreign relations, taxation, national defense, judicial remedies, and the preservation of constitutional rights. His term of office is fixed by statute and constitution. But no statute fixes the term of a bargaining agent—the "one-year" term is a gloss invented by the Board.

The analogy of the election of an officer of a private club is even more fanciful. Assuming that the by-laws of such a club fixed the term of office, nothing would prevent their amendment by the membership, and nothing would prevent an individual from resigning from the club if he did not like the officers. But does the Board mean to say

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[15] *Seventeenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1952*, pp. 159-160, and cases cited. See also *supra*, this brief, p. 5, fn. 3.

that the only remedy of the majority or perhaps all of the employees in a factory is to quit their jobs if they no longer wish to continue the bargaining agent who was chosen in a Board election? They can oust the agent, the Board admits, if he was originally designated by cards (see above, pp. 4-5). But, claims the Board, they cannot for a year remove even a faithless agent if he was chosen at a Board election. What greater absurdity could there be?

In conclusion we take issue with the Board's contention that Congress by the 1947 amendments accepted the Board's "one-year rule." As previously shown herein (*supra*, p. 9), the legislative object in restricting elections to not more than one a year was to cure the abuse of repeated elections at short intervals on the petition of a union which had failed to get a majority vote. The Board's assertion (p. 42 of its brief) that Congress approved its "one year" rule "after the most careful deliberation" is sheer phantasy. The fact that the conferees in 1947 dropped the provision in the House bill permitting a decertification election within a year indicated nothing beyond an intention not to have elections of any kind in excess of one a year. As to the dropping of the said provision, the House conference report simply stated that the "conference agreement adopts the provisions of the Senate amendment," *i.e.*, § 9(c)(3) as passed by the Senate prohibiting all elections in excess of one a year. (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49.) These simple facts are far from constituting legislative acceptance and codification of the illiberal doctrine that for a year employees cannot by any means whatsoever end the power of an unwanted agent.[16]

[16]Likewise the excerpt from Senator Taft's speech on the floor, quoted on p. 42 of the Board's brief, exemplifies his intent to abolish excessively frequent elections. Mr. Taft would have been the last man in the world to force the majority of the employees to bargain through a representative whom they had repudiated. That would be the antithesis of the spirit and letter of the Act which bears his name.

The Board itself is apparently unsure of its argument based upon legislative history, because it urges (pp. 44-45 of its brief) that, even if Congress did not have the purpose of codifying the Board's "rule" as to non-revocability of an agency after a Board election, "it is a fair inference from all the circumstances" that Congress accepted such administrative construction. To that proposition the Board cites three cases.[17] These cases, however, proceed on the theory of a uniform administrative construction and practice.

In the case at bar we have seen that the Board's "one-year rule" does not in fact involve the construction of any statutory language, and as an administrative practice it has been indeed far from consistent and uniform. (See main *amicus* brief, pp. 8-11.) Moreover, such "rule" is contrary to the 1947 amendment of § 7, guaranteeing the right to refrain from collective bargaining. Finally, the courts have by no means uniformly sustained the Board's position and have been often highly critical thereof. (See, *e.g.*, *National Labor Rel. Bd.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64; *Mid-Continent Petroleum Corp.* v. *National Lab. Rel. Bd.*, 204 F. 2d 613, certiorari denied 346 U. S. 856.)

Before Congress can be deemed to have accepted an administrative practice, it must be one which is clear, uniform, and consistent, and in consonance with and not contrary to the statute. Although circumstances may sometimes justify weight to be attached to an administrative practice, "the qualification of that principle is as well established as the principle itself", namely that the practice must be consistent and uniform. (*Barnet* v. *Chicago Portrait Co.*, 285

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[17] *Labor Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923, cert. den. 342 U. S. 859; and *National Labor Relations Bd.* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161.

U. S. 1, 16. See also, *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 280, and *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 589.) The varying practice and the inconsistencies of the Board are, in part, described in the opinion in *National Labor Rel. Bd.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 68-9.

Finally we submit that what the Board here advocates is really an abuse of its original doctrine. What began as "a reasonable period" under all the facts and circumstances became in time a conclusive presumption of one year, which was applied to prevent revocation where there had been a Board-conducted election, but which was not applied where the agent had been designated by other means. This presumption the Board now asks this Court to sanction, and to do so in the face of the statutory right, existent at all times, of employees to refrain from collective bargaining. Such a rule, reminiscent of the laws of the Medes and Persians, would choke the liberty of workingmen. And to no purpose except the profit of the bargaining agent. Let us assume that the bargaining agent is an individual, as he may well be. (*Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.) Suppose that this individual is jailed for a felony, suppose he embezzles and becomes a fugitive, suppose for any reason that he becomes unwanted as a bargaining agent—must the employees sit by for a year, must they "accommodate" themselves to their chains?

This Court has jealously guarded human liberties. It is always the last resort of those who struggle to preserve those liberties.

Respectfully submitted,

HENRY S. FRASER,
Counsel for Genesee Foundry Company, Inc.,
Amicus Curiae.

No. [redacted] 81

In the Supreme Court of the United States

OCTOBER TERM, 1953

RAY BROOKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 536

RAY BROOKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Acting Solicitor General files this memorandum on behalf of the National Labor Relations Board, and states that the Government does not oppose the granting of the writ of certiorari sought herein.

Although we believe the decision of the court below is, for the reasons summarized therein, correct in holding that a Board certification of bargaining representatives is normally operative and

binding for a reasonable period of time despite any intervening shift in employee sentiment as to their choice of bargaining representative, the decision is in express conflict with the decisions of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927, and *Mid-Continent Petroleum Corporation* v. *National Labor Relations Board*, 204 F. 2d 613, certiorari denied, 346 U.S. 856.

As petitioner states, the question presented is of major importance in the administration of the National Labor Relations Act. It is imperative that employers, labor organizations, and employees know in their dealings with each other whether a Board certification of bargaining representatives is operative for a reasonable period of time or whether the employees may repudiate their duly elected representative at will. None of these parties can be certain of the effect of a Board certification upon their rights and obligations under the Act unless the conflict of decisions on this question is resolved. In the absence of a definitive determination of the issue by this Court the Board will unavoidably be forced to adhere to the Sixth Circuit's ruling in cases arising in that Circuit while at the same time adhering to its normal rule that a certification is operative for a reasonable period of time in the other circuits which have generally approved the Board's rule.

Because of the conflict of decisions and the importance of the issue, we do not oppose the granting of a writ of certiorari and respectfully urge that the writ be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

FEBRUARY, 1954.

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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1954

RAY BROOKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

312863—54——1

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 66–84) [1] is reported at 204 F. 2d 899. The findings of fact, conclusions of law, and order of the Board (R. 6–19, 24–27) are reported at 98 N. L. R. B. 976.

JURISDICTION

The decision of the court below and its decree enforcing the Board's order were entered on May 14, 1953 (R. 84, 85–88). A petition for rehear-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

ing, filed on June 2, 1953, was denied on December 16, 1953 (R. 89). The petition for a writ of certiorari was granted on March 8, 1954 (R. 91). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

After an election in which a majority of petitioner's employees in an appropriate bargaining unit selected a union as their bargaining representative, the National Labor Relations Board certified the union as such representative. A week after the election was held and prior to the issuance by the Board of its certification, petitioner and the union received a document signed by a majority of the employees stating that they did not wish the union to represent them. Petitioner thereupon refused to deal with the union.

The question presented is whether, despite this repudiation of the union by the employees, the Board was entitled to hold that petitioner was required to bargain collectively with the union for a reasonable period of time following the election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449), 29 U. S. C. (1946 ed.) 151, *et seq.*) and after amendment (61 Stat. 136, 65 Stat. 601, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 49–58.

STATEMENT

I. THE BOARD'S FINDINGS, CONCLUSIONS, AND ORDER

Pursuant to a consent election conducted by the National Labor Relations Board's Regional Director on April 12, 1951, petitioner's employees in an appropriate collective bargaining unit, by a vote of eight to five,[2] selected the Union (International Association of Machinists, District Lodge No. 727) as their bargaining representative (R. 9; 3–4, 31–37). No objections to the election were filed and on April 20, 1951, the Regional Director, on behalf of the Board, certified the Union as the employees' bargaining representative (R. 9; 39, 30).

On April 19, the day before the certification issued, petitioner and the Union each received in the mail a document bearing the purported signatures of nine of the thirteen employees who had cast valid ballots in the election (R. 9–10; 37–38, 45, 48, 47). This document (R. 10; 45) read as follows:

April 18, 1951

> We, the undersigned majority of the employees of Ray Brooks, Chrysler-Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys,

[2] All of the employees in the unit, numbering 15, voted. Two ballots, however, were challenged on the ground that they had been cast by employees of supervisory status (R. 9). The tally of the other votes cast made it unnecessary to resolve these challenges.

> Calif., are not in favor of being represented by union local No. 727 as a bargaining agent. We respectfully submit this petition for your consideration.

Thereafter, in response to the Union's request for a bargaining conference, petitioner, by his counsel, replied by letter on May 1 (R. 16; 40, 41). In this letter petitioner stated that he had "been given to understand" that a majority of the employees had repudiated the Union and no longer wished to be represented by it. Petitioner then stated that, in a recent decision, the Court of Appeals for the Sixth Circuit had held that an employer could not be compelled to bargain with a union under such circumstances. He concluded by inquiring whether it would not "be wiser to defer consideration of the proposed negotiations until such time as it might appear that the employees desire to have your union represent them" (R. 16–17; 42). There was no evidence of any other communication between the parties (R. 17).

On the basis of the above facts, the Board concluded that petitioner's letter of May 1 constituted a refusal to bargain with the certified Union, in violation of Section 8 (a) (5) and (1) of the National Labor Relations Act. The Board, following its settled rule that the selection of bargaining representatives by employees in a Board-conducted election is normally valid and conclusive for a reasonable period of time, usually one

year—despite any intervening shift of employee sentiment as to their choice of representatives—held that the purported repudiation of the Union by the employees a few days after the election did not constitute such special circumstances as to impair the Union's representative status. Accordingly, it concluded that petitioner's refusal to bargain with the Union on and after May 1, 1951, was not excused by petitioner's receipt on April 19 of the purported repudiation by the employees of their elected bargaining representative (R. 11–14).[3]

The Board ordered petitioner to cease and desist from refusing to bargain and from in any manner interfering with the efforts of the Union to bargain with him. Affirmatively, it ordered petitioner, upon request, to bargain with the Union and to post appropriate notices (R. 25–27, 23).

II. THE DECISION OF THE COURT BELOW

The Court of Appeals enforced the Board's order (R. 84). Treating as authentic the purported communication of the employees repudiating the

[3] The Board's trial examiner also discounted the weight to be accorded to the purported communication of the employees repudiating the Union since no evidence was introduced to establish the authenticity of the document (R. 14–16). The court below accepted the document as authentic and, for purposes of its decision, took it as a fact that a majority of petitioner's employees repudiated the Union on April 18, 1951 (R. 70–71). Argument here does not turn upon the authenticity of the document in question.

Union, the court nevertheless affirmed the Board's conclusion that petitioner had unlawfully refused to bargain with the Union on and after May 1, 1951, and that the employees' repudiation of their elected representative afforded no justification for petitioner's refusal to bargain collectively with the Union (R. 70–71). It agreed with the Board that the objectives of the statute and its legislative history require that the choice of a bargaining representative made by employees in an election conducted by the Board pursuant to the Act be, in the absence of unusual circumstances, valid and conclusive for a reasonable period of time despite any intervening shift of employee sentiment as to their choice. Applying this rule to the instant case, the court held that "it is plain that when the employees repudiated the Union one week after the election a 'reasonable time' had not passed to give the bargaining relationship a fair chance to succeed. No unusual circumstances appear. Accordingly, the Board was justified in concluding that the Union continued to be the bargaining representative of the employees and that [petitioner's] refusal to bargain constituted an unfair labor practice" (R. 83–84).

SUMMARY OF ARGUMENT

A. Both the original and amended Act empower the Board, whenever a question of representation of employees exists, to direct an election by secret ballot and to certify the result. When the Board,

following such election, certifies that a union has been selected as their bargaining representative by a majority of the employees in an appropriate unit, the union acquires an exclusive and statutorily protected right to bargain with the employer on behalf of all the employees in the unit with respect to terms and conditions of employment.

Neither the original nor amended Act specifies in terms the length of time that the union is entitled to enjoy that exclusive status without being required to meet a claim that changed circumstances have resulted in a loss of its majority. Congress necessarily left the determination of that question to the Board in the exercise of its function to give content and meaning to the broad provisions of the Act and "coordinated effect to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348.

One of the major objectives of the Act is to guarantee to employees freedom of choice in their selection of representatives for purposes of collective bargaining. Another, and equally important, objective is to stabilize industrial relations through collective bargaining. For "collective bargaining is not an end in itself, it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advan-

tageous both to the worker and the employer." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

In administering the representation features of the Act and fixing the operative period of a certification of bargaining representatives, the Board has been faced with the necessity of harmonizing and striking a fair accommodation between these two basic but somewhat divergent aims, and balancing the advantages of stability in labor relations against the desirability of affording employees an unlimited freedom to choose representatives at will. While recognizing that the employees possessed an undoubted power to recall an elected representative, the Board nevertheless concluded that effectuation of the statutory policy to stabilize industrial relations necessarily required that a bargaining representative, duly chosen in a Board-conducted election, must be permitted to exist and function for a reasonable period, irrespective of any intervening shift in its majority status. Accordingly, giving coordinated effect to the statutory objectives, the Board adopted the rule that, absent unusual circumstances, a bargaining representative chosen by the employees in a Board-conducted election is entitled to recognition for a reasonable period of time, usually one year, without regard to any evidence of intervening repudiation by the employees or change in their choice of representatives.

B. The Board's "reasonable period" rule represents an appropriate and valid administrative

accommodation, which the Court should accept, between the dual statutory objectives to foster stability in industrial relations through collective bargaining and to assure employees full freedom of self-organization. Manifestly, an election by secret ballot, hedged by the careful safeguards which the Board has adopted, is the most effective and reliable device to ascertain the employees' free and deliberate choice of bargaining representatives. Once the employees have formally and deliberately registered their choice under full governmental protection and through secret ballot, it is reasonable to require, in view of the public interest in preserving stable industrial relations as well as the practical operation of the collective bargaining process, that there be some measure of permanence to the relationship and that employees be held to their choice for a reasonable time. The legislative purpose to stabilize labor relations for a period through the making of collective bargaining agreements would probably fail of achievement unless, as this and other courts (with one exception) have held, "a bargaining relationship once rightfully established [is] permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705. Quite properly, the Board has felt that neither it nor the courts can stand by constantly and continually to

reexamine the employees' wishes and redetermine their current choice of representatives; the line must be drawn at some point of time.

A contrary rule does not make for industrial stability nor is it conducive to harmonious labor relations. It would render difficult, if not impracticable, the making of collective bargaining agreements. For neither the employer nor the representative of the employees could enter into negotiations for that purpose with any assurance that before the consummation of a contract the employees' representative would not be divested of its authority to bargain on their behalf. Nor, if a contract were consummated, would there be any assurance that it would stabilize the employment relationship for its duration. For to permit employees to choose representatives at will might well result in leaving them either without a representative to administer the contract or, possibly, a series of representatives, all strangers to the agreement, to administer it as best as they could or even to repudiate it. Finally, a Board representation election instead, as Congress intended, "of inaugurating a period of industrial repose, would lead only to continued raiding of the bargaining agent's membership and the disrupting influence of rival union activities within the bargaining unit" (opinion below, R. 83).

The Board's policy avoids these consequences. That policy recognizes the necessity in a democratic scheme of representation of subordinating,

for a time, shifts in employee sentiment in favor of stability in employer-employee relations and thereby attaining the statutory goal of industrial peace under collective agreements. The Board's policy thus accords with the basic scheme of the Act's representation procedures. Congress, in adopting the majority principle of representation, consciously followed "our governmental practices, * * * business procedure, and * * * the whole philosophy of democratic institutions" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13). Just as the practical operation of our political institutions requires that shifts in the sentiment of the electorate be subordinated in favor of stability in government, so stability in labor relations requires that a measure of permanence be accorded to the status of a duly elected bargaining representative, irrespective of changing sentiment among the employees.

C. The amended Act and its legislative history demonstrate that Congress accepted the rule adopted by the Board and approved, with only one exception, by the courts of appeals. In 1947 Congress amended the Act to provide, *inter alia*, that "No election shall be directed [by the Board] in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." Section 9 (c) (3). The legislative debates and reports on this amendment establish that Congress was fully

aware of the Board's "reasonable period" rule; that it was the object of explicit mention and approval in Congress; and that Section 9 (c) (3) was in part designed to codify that rule. Both divisions of Congress agreed that when a union won a representation election, "its majority cannot be challenged for a year" and it "remains the bargaining agent until the end of that year" (93 Cong. Rec. 3838, S. Rep. No. 105, 80th Cong., 1st Sess., p. 25). In these circumstances, it is a fair inference that Congress accepted the Board's construction of the Act. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, 366.

ARGUMENT

THE NATIONAL LABOR RELATIONS BOARD AND THE COURT BELOW PROPERLY HELD THAT THE CHOICE OF BARGAINING REPRESENTATIVE MADE BY EMPLOYEES IN AN ELECTION CONDUCTED BY THE BOARD PURSUANT TO THE NATIONAL LABOR RELATIONS ACT IS NORMALLY VALID AND CONCLUSIVE FOR A REASONABLE PERIOD OF TIME

The single question presented here is whether under the Act the selection of a bargaining representative by employees by secret ballot, in a Board-conducted election, may normally be deemed valid and conclusive for a reasonable period of time regardless of any intervening shift of sentiment among the employees as to their choice, or whether the employees may voluntarily disavow or repudiate their duly elected representative at

will.[4] Answering this question and epitomizing the controlling considerations, ~~Judge Learned Hand, speaking for~~ the Court of Appeals for the Second Circuit, said in 1944 (*National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542–543, certiorari denied, 323 U. S. 714):

> The purpose of the Act is to insure collective representation for employees, and to that end § 9 gives power to the Board to supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results: freedm to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under

[4] This question was left open in this Court's decision in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684–685. It was not conclusively resolved by *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, because there, unlike here, the loss of majority status by the bargaining representative was attributable to the employer's unfair labor practices. However, as we show below, pp. 25–34, the considerations which were decisive in *Franks Bros.* are in large measure also controlling here.

> proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees.

We submit that this principle, disputed only by the Court of Appeals for the Sixth Circuit,[5] governs this case. As we show below, the Board early in its administration of the Act enunciated the rule that the choice of bargaining representatives made in a Board-conducted election is usually binding for a reasonable period of time; the rule represents an appropriate and valid accommodation between fundamental but somewhat divergent policies and purposes of the Act; it has received the almost uniform approval of the courts both before and after the 1947 amendments to the Act; and, finally, Congress, in adopting the 1947 amendments to the Act, carefully considered and ratified the Board's established rule.

A. THE BOARD'S RULE IS THAT THE DULY ELECTED BARGAINING REPRESENTATIVE IS NORMALLY ENTITLED TO RECOGNITION FOR PURPOSES OF COLLECTIVE BARGAINING FOR A REASONABLE PERIOD OF TIME, USUALLY ONE YEAR

The original Act, like the amended Act, empowered the Board, whenever a question of representation of employees exists, to direct an election by secret ballot and to certify the results. Sec-

[5] See *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856. All the other courts which have considered the issue have indorsed the principle. See cases cited and discussed, *infra*, pp. 25–27, 45–46.

tion 9, *infra*, pp. 50–51, 55–58. When the Board, pursuant to the Act, certifies that a union has been selected as their bargaining representative by a majority of the employees in an appropriate unit, the union acquires an exclusive and statutorily protected right to bargain with the employer on behalf of all the employees in the unit with respect to terms and conditions of employment. *Id.*; *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U. S. 678; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

Neither the original nor the amended Act specifies in terms the length of time the union is entitled to enjoy that exclusive status without being required to meet a claim that changed circumstances have resulted in a loss of its majority. Congress, in vesting the Board with "the responsibility of exercising its judgment in employing the statutory powers" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194), necessarily left the determination of this question to the Board in the light of the general policies and purposes of the Act and the Board's specialized experience in the field of labor relations. "How long the employees' undoubted power to recall an elected representative may be suspended, is a matter primarily, perhaps finally, for the Board * * *." *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 543 (C. A. 2), certiorari denied, 323

U. S. 714. As this Court has declared, "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp., supra.* Cf. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344; *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.,* 344 U. S. 392, 394.

One of the major objectives of the Act is to provide employees "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 1, *infra,* pp. 49–50, 51–53. A second, and no less important, objective of the Act is to "encourag[e] the practice and procedure of collective bargaining" for "the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." Section 1, *ibid.* Explaining the underlying purpose of the statutory objective, the Senate Report on the original Act stated, "The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards

of working conditions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. Similarly, the House Report declared, "As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous to both the worker and the employer." The Report further added, "stability * * * is one of the chief advantages of collective bargaining." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.[6]

In administering the representation features of the Act, and fixing the operative period of a certification of bargaining representatives, the Board was thus faced from the outset with the problem of harmonizing, and striking a fair accommodation between, these two basic, but somewhat divergent, aims of the Act, and of balancing the advantages of stability in collective bargaining and labor relations against the desirability of affording employees full and unlimited freedom in their choice of representatives. As this Court has pointed out, "It is the business of the Board to give coordinated effect to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348.

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[6] See, also, *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

The Board early came to the conclusion that, while employees possessed an undoubted power to recall an elected representative, effectuation of the statutory policy to stabilize industrial relations through collective bargaining required that a bargaining relationship, rightfully established through a Board election, must be permitted to exist and function for a reasonable period despite any evidence of repudiation or loss of majority by the bargaining representative. As the Board has explained (*The Century Oxford Mfg. Co.*, 47 N. L. R. B. 835, 846):

> Normally the administrative processes of the Act afford the best method of resolving doubts concerning employees' sentiment, once such sentiment has been tested in an election and a reasonable time has not since elapsed. Problems arising from alleged shifts of allegiance following Board elections are among the most difficult with which this Board is confronted. In considering such allegations the Board must balance the advantages of stability in collective bargaining against the desirability of affording employees full freedom of choice of representatives. The Board has attempted to achieve a balance between these conflicting policies by refusing to entertain representation petitions within a reasonable period after an election, except where unusual circumstances intervene. Without such a rule, collective bargaining would be deprived of stability, and administrative

> determinations would become ephemeral. [Footnotes omitted.] [7]

Within the framework of these broad considerations, the Board has long held that in the ordinary case one year of immunity from challenge to its representative status would afford a certified union the necessary "reasonable period" to accomplish what the statute seeks to foster, namely, "the friendly adjustment" through collective bargaining "of industrial disputes arising out of differences as to wages, hours, or other working conditions." [8] Section 1, *infra*, pp. 50, 52–53. The Board has set forth its rule as follows (*Celanese Corp. of America*, 95 N. L. R. B. 664, 671–672):

> In the interest of industrial stability, this Board has long held that, absent unusual circumstances, the majority status of a certified union is presumed to continue for one year from the date of certification. In practical effect this means two things:

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[7] See, also, *Kimberly-Clark Corp.*, 61 N. L. R. B. 90, 92; *General Box Co.*, 82 N. L. R. B. 678, 681–682; *Soss Mfg. Co.*, 56 N. L. R. B. 348, 352; *Whittier Mills Co.*, 15 N. L. R. B. 457, 463; *Botany Worsted Mills*, 41 N. L. R. B. 218, 230; *American Steel Foundries*, 85 N. L. R. B. 19, 20; N. L. R. B., *Fifteenth Annual Report*, 1950 (Govt. Print. Off. 1951), p. 74; *Sixteenth Annual Report*, 1951 (Govt. Print. Off. 1952), p. 83.

[8] See N. L. R. B., *Fourth Annual Report*, 1939 (Govt. Print. Off. 1940), p. 76; N. L. R. B., *Fifth Annual Report*, 1940 (Govt. Print. Off. 1941), p. 56; N. L. R. B., *Seventh Annual Report*, 1942 (Govt. Print. Off. 1943), p. 56; and cases cited there.

> (1) That the *fact* of the union's majority during the certification year is established by the certificate, without more, and can be rebutted only by a showing of unusual circumstances; and (2) that during the certification year an employer cannot, absent unusual circumstances, lawfully predicate a refusal to bargain upon a doubt as to the union's majority, even though that doubt is raised in good faith. However, after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point *rebuttable* even in the absence of unusual circumstances.[9]

Consistently with this rule the Board has uniformly held, as here, that a voluntary repudiation by employees of their duly elected collective bargaining representative or intervening shift in their choice of representatives does not, without more, constitute the special circumstances which

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[9] The same principles have been applied where the bargaining relationship is established by a settlement agreement made between the parties, with Board approval, disposing of unfair labor practice charges. *Poole Foundry and Machine Company* v. *National Labor Relations Board*, 192 F. 2d 740, 742–743 (C. A. 4), certiorari denied, 342 U. S. 954. Similarly, where a certification is challenged by the employer and litigation is required to establish its validity, the protected period has been held to run from the date of the court decree enforcing the Board's bargaining order which was based upon the certification. *Semi-Steel Castings Co.*, 88 N. L. R. B. 609, 610; N. L. R. B., *Fifteenth Annual Report*, 1950 (Govt. Print. Off. 1951), p. 74.

suspend the application of the rule nor serve to relieve the employer of his duty to bargain with the elected representative for a reasonable period, usually one year, following the election.[10]

B. THE BOARD'S "REASONABLE PERIOD" RULE REPRESENTS AN APPROPRIATE AND VALID ACCOMMODATION BETWEEN THE DUAL STATUTORY OBJECTIVES TO FOSTER STABILITY IN INDUSTRIAL RELATIONS AND TO ASSURE EMPLOYEES FULL FREEDOM OF SELF-ORGANIZATION

As we have noted (*supra*, pp. 15–17), it is the duty and responsibility of the Board to weigh the "countervailing considerations" and to determine

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[10] N. L. R. B., *Eighteenth Annual Report*, 1953 (Govt. Print. Off. 1954), p. 43; *Seventeenth Annual Report*, 1952, pp. 160–161; *Sixteenth Annual Report*, 1951, pp. 188–189; *Fifteenth Annual Report*, 1950, p. 118; *Twelfth Annual Report*, 1947, p. 13; *Eleventh Annual Report*, 1946, p. 17; *Ideal Roller & Mfg. Co.*, 109 N. L. R. B. No. 47; *The Baker and Taylor Co.*, 109 N. L. R. B. No. 38.

The Board has found the existence of special circumstances warranting an exception to its rule in the following circumstances: where the bargaining representative switched its affiliation from one international union to another, so that the identity of the bargaining representative became doubtful and the stability of the bargaining relationship was threatened (*Armour & Co.*, 12 N. L. R. B. 49; *Carson Pirie Scott & Co.*, 69 N. L. R. B. 935, 938; *Swift & Co.*, 94 N. L. R. B. 917, 919; *General Electric Co.*, 96 N. L. R. B. 566, 569); where the number of employees doubled or quadrupled in the space of a year (*Westinghouse Electric & Manufacturing Co.*, 38 N. L. R. B. 404; *Celanese Corporation of America*, 73 N. L. R. B. 864); where the certified union has become defunct (*Henry Heide, Inc.*, 107 N. L. R. B. No. 258; *C & D Batteries*, 107 N. L. R. B. No. 261; *Helena Rubinstein*, 47 N. L. R. B. 435, 437; *Public Service Electric and Gas Co.*, 59 N. L. R. B. 325, 327). None of these circumstances is, or is claimed to be, present here.

how long the certification shall be effective. See, *e. g., National Labor Relations Board* v. *Seven-Up Company,* 344 U. S. 344, 346–349. If the Board's determination is reasonable and has support in the purposes of the Act, the courts do not substitute their own judgment for the administrative policy. We believe that the factors supporting the Board's rule clearly sustain its propriety and validity, and the arguments which petitioner brings against it are far from enough to call for its overthrow by the Court.

1. The Act authorizes the Board to direct an election by secret ballot whenever a question concerning representation arises and to certify the results. *Supra,* pp. 14–15. Implementing the statute, the Board has prescribed that a secret election under the supervision of Board agents may be held for this purpose either pursuant to a consent election agreement between the parties or pursuant to a formal hearing and direction of election by the Board.[11] Prior to the election, official notices of election are posted at appropriate places, reproducing a sample ballot and outlining such election details as location of polls, time of voting, and eligibility rules. At the election, challenges may be made by Board agents or by the authorized observers representing the parties. Objections to the conduct of the election may be filed

[11] N. L. R. B., Rules and Regulations, Series 6, as amended, Secs. 102.52–102.64; and Statements of Procedure, effective June 3, 1952, Secs. 101.16–101.20.

within a prescribed time and, if any are filed, they are investigated and decided by the Regional Director who conducted the election or by the Board, sometimes after formal hearing. If the election results in a majority for a claimant, the Board certifies it as the bargaining representative of the employees within the bargaining unit.

Manifestly, an election by secret ballot, hedged by the careful safeguards which the Board has adopted, affords "the most effective way of getting an untrammelled expression of the desires of the electorate" (*National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751), as well as "the most reliable means of ascertaining the deliberate will of the employees" (*Century Oxford Mfg. Corp., supra*, 140 F. 2d at p. 543).[12] Once the employees have formally and deliberately registered their choice while under full governmental

[12] It is for this reason that the Board does *not* apply its "reasonable period" rule where the employees have indicated their choice informally, as by membership cards, petitions, and the like. In those situations the Board holds that, absent any intervening employer unfair labor practice, the employees may repudiate their representative at will at any time prior to the consummation of a collective bargaining agreement. *Henry Weis Manufacturing Company, Inc.*, 49 N. L. R. B. 511; *Frigo Bros. Cheese Corp.*, 50 N. L. R. B. 464, 473; *Joe Hearin, Lumber*, 66 N. L. R. B. 1276, 1283 and 68 N. L. R. B. 150; *Electro Metallurgical Co.*, 69 N. L. R. B. 772, 774–775; *Products Mfg. & Engineering Corp.*, 73 N. L. R. B. 233, 234–235; *Bell Cabinet Co.*, 73 N. L. R. B. 332, 334–335; *National Waste Material Corp.*, 93 N. L. R. B. 477, 478–479.

protection and through secret ballot, the public interest in preserving stable industrial relations, as well as the practical operation of the collective bargaining process, would seem to require that there be some measure of permanence to the relationship and the employees held to their choice for a reasonable period of time. Indeed, Congress itself implicitly recognized in its study of the bill which became the original Act that the aim of the statute to secure industrial peace through collective bargaining would be frustrated, if not defeated, unless the bargaining representative deliberately and formally chosen by the employees in a Government-sponsored election be permitted to function, free from challenge to its representative status, for a reasonable time. Thus, the Senate Committee reporting the original Act stated with respect to the representation provisions of the statute, "Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. * * * Such a course provokes constant strife, not peace." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12. Sharing a similar view, the House Committee declared that it adhered "to the common belief that the device of an election in a democratic society has, among other virtues, that

of allaying strife, not provoking it." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22.

The legislative purpose, to introduce a measure of stability in industrial relations and allay strife, would probably fail of achievement unless, as this Court has pointed out, "a bargaining relationship once rightfully established [is] permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705. Since the passage of the original Act, the Courts of Appeals, with the exception of the Sixth Circuit, have recognized with almost unvarying uniformity that this principle is indispensable to the practical operation of the collective bargaining process to effectuate the Congressional purpose and that it represents an appropriate and valid accommodation of the basic statutory policies. The First, Second, Third, Fourth, Fifth, Seventh and Ninth Circuits have all taken this view. As the Court of Appeals for the Fourth Circuit, in a statement aptly summarizing a host of cases, has declared, "Inasmuch as a major objective of the * * * Act is to bring about a contract binding on both parties with some fair degree of permanence * * * a certification must be endowed with a longevity sufficient to accomplish its essential purpose." *National Labor Relations Board* v. *Appalachian Electric Power Co.*,

140 F. 2d 217, 221. See also the statement of Judge Learned Hand, quoted *supra*, pp. 13–14.[13]

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[13] *Accord: National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. A. 3), certiorari denied, 319 U. S. 754; *National Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C. A. 3); *National Labor Relations Board* v. *Borchert*, 188 F. 2d 474, 475 (C. A. 4); *National Labor Relations Board* v. *Sanson Hosiery Mills, Inc.*, 195 F. 2d 350, 352 (C. A. 5), certiorari denied, 344 U. S. 863; *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 389 (C. A. 6); *National Labor Relations Board* v. *Grieder Machine Tool and Die Co.*, 142 F. 2d 163, 165 (C. A. 6), certiorari denied, 323 U. S. 724; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 792 (C. A. 7), certiorari denied, 340 U. S. 930; *National Labor Relations Board* v. *Arnold Motor Co.*, 173 F. 2d 397, 399 (C. A. 7). *Contra: National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (C. A. 6); *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856. See also fn. 21, *infra*, pp. 45–46.

Where the loss of majority is attributable to the employer's unfair labor practices, the courts have, of course, followed this Court's decision in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, that the Board may require the employer to bargain with the union for a reasonable time despite the loss of majority status. *National Labor Relations Board* v. *Swift and Co.*, 162 F. 2d 575, 584–585 (C. A. 3), certiorari denied, 332 U. S. 791; *National Labor Relations Board* v. *Harris-Woodson Co.*, 162 F. 2d 97, 99–100 (C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding and Drydock Corp.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 759–

A contrary rule, as the courts have recognized, would "make chaos out of the administration of the statute and prevent the protection of the very rights which it aimed to secure." *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751. The consequences which would flow from such a rule and the manner in which it would tend to defeat the Congressional policy are manifest. It would render difficult, if not impracticable, the making of collective agreements. As the Court of Appeals for the Fourth Circuit has explained in the *Appalachian Electric Power Co., supra,* 140 F. 2d at pp. 221–222:

> * * * To assume that the Board's certification speaks with certainty only for the day of its issuance and that a Company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority

760 (C. A. 4); *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251 (C. A. 5); *National Labor Relations Board* v. *Kress & Co.*, 194 F. 2d 444, 446 (C. A. 6); *Valley Mould and Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–765 (C. A. 7), certiorari denied, 313 U. S. 596; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 794, 795 (C. A. 7), certiorari denied, 340 U. S. 939. But see, *National Labor Relations Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C. A. 4), limited upon rehearing to the "peculiar facts" of that case (unreported order of the U. S. Court of Appeals dated May 7, 1946, in case Docket No. 5440), *infra*, p. 46, fn. 21.

status would lead to litigious bedlam and judicial chaos. Indeed, if the Company's contention were correct, the Board's certification might even be obsolete and subject to nullification by an interim informal Gallup poll vote on the very day of its issuance. * * *

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"The very nature of the subject matter with which the Act deals leaves no room for (the Company's) contention. Employer-employee relations entail a flowing stream of human relations and attitudes, continually modified by innumerable environmental variations, by day to day changes in desires and moods and by the bargaining process itself. It may be, therefore, that each successive day presents a different picture of employee attitudes, and that successive redeterminations of the employees' choice might record with greater precision the shifting currents in the bargaining unit. For this very reason, however, a showing of present change cannot serve to abate the effect of the Board's certification. Neither the Board nor the courts can stand by continually, and constantly reexamine the state of the everchanging stream to redetermine the authority of a recently designated representative. Necessarily the line must be drawn at some point in time; and when the fact-finding body, pursuant to statutory authority and upon a fair and secret election, makes a determination of the will of

the employees, its certification must be accorded a durability consistent with the practical administration of the legislative policy.

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"Under (the Company's) construction, however, this Congressionally encouraged process of peaceful negotiation would have to be conducted with the knowledge on the part of both bargainers that the authority of one of them was currently subject to revocation by the first shift of employee sentiment that might occur. To the recalcitrant employer, such an interpretation would be an invitation to procrastinate. To the law-abiding employer it would be a deterrent to the honest expenditure of time and effort in bargaining, for he would have no assurance whatever that, by the time the negotiations were completed, the Union would still be in a position to join in a binding contract. To the Union, it would be a spur to hasty and unconsidered action in order to anticipate the possibility that at some point during extended good-faith bargaining enough employees might waver in their support to reduce the Union's majority, even momentarily, to a minority."

The disruptive impact of a statutory interpretation permitting employees to repudiate at will their duly elected bargaining representative extends beyond the initial stages of negotiation. Collective bargaining involves, of course, more than the making of an agreement. It includes,

also, the enforcement and interpretation of the agreement throughout the months of its duration. For "[i]nevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338. One of the functions of the bargaining representative is to negotiate concerning these differences and to attempt to resolve them. See *Elgin, Joliet and Eastern Ry.* v. *Burley,* 325 U. S. 711; Section 9 (a), *infra,* p. 55. To permit employees to repudiate their duly elected representative which is a party to the collective bargaining agreement would result in leaving them either without a representative to administer the contract or else, possibly, with a series of representatives, all strangers to the collective agreement, to administer it as best as they could or perhaps to repudiate it. Neither result is "conducive to harmonious labor relations" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13).

Also, as the court below pointed out (R. 83), if the employees are free to repudiate at will their duly elected representative, a Board conducted election "instead of inaugurating a period of industrial repose, would lead only to continued raiding of the bargaining agent's membership and the disrupting influence of rival union activities within the bargaining unit." The election device, as Congress saw it, was for the purpose of "al-

laying strife, not provoking it" (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22) and to put at rest, for a time, in the interest of "harmonious labor relations," the divisive and disruptive influences which "numerous warring factions" competing for the employees' support necessarily provoke (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13). This objective can hardly be achieved if the election does not settle for a reasonable time the choice of bargaining representative.

In contrast, the Board's policy serves "the dual purpose of encouraging the execution of a collective bargaining contract and enhancing the stability of industrial relations" (*Centr-O-Cast & Engineering Co.*, 100 N. L. R. B. 1507, 1508). At the same time, it preserves to the employees "the right to challenge the representative status of an incumbent union at predictable and reasonable intervals" (*American Steel Foundries*, 85 N. L. R. B. 19, 20). The policy thus recognizes the necessity in a democratic scheme of representation, which the Act adopts, of subordinating, for a time, shifts in employee sentiment in favor of a reasonable measure of stability in employer-employee relations and thereby attaining the statutory goal of industrial peace under collective agreements. This is but an adaptation of the rule " 'sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions' " (*National Labor Relations Board* v. *Tower Co.*, 329 U. S. 324, 331,

332) which temporarily ignores shifts in the sentiment of the electorate in favor of stability in government. *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542–543, certiorari denied, 323 U. S. 714. The Board's policy thus accords with the basic scheme of the representation procedures of the Act. For, it was "our governmental practices, * * * business procedure, and * * * the whole philosophy of democratic institutions" that prompted Congress to adopt the principle of majority rule incorporated in Section 9 of the Act. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. This principle has been applied, not only in the political realm but also in corporations, clubs, societies, and associations of all types, to keep representatives or officials in office for a given period despite interim dissatisfaction or repudiation by the "electorate."

This Court's decision in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, illustrates and confirms the necessity of subordinating, for a time, the employees' freedom to select representatives to other statutory objectives. There, the Board issued an order requiring the employer to bargain with a union despite the claim that, following the employer's illegal refusal to bargain with it, the union, as a result of a turnover among the employees in the unit, no longer represented a majority of them. Uphold-

ing the order, this Court declared (321 U. S. at 705–706):

> * * * The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. * * * That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. * * *
>
> Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co.* v. *Labor Board*, 139 F. 2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *Labor Board*

> v. *Appalachian Power Co.*, 140 F. 2d 217, 220–222; *Labor Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. * * *

The loss of majority in the instant case, unlike *Franks Bros.*, was not attributable to any unfair labor practices on petitioner's part. But just as the Board in the *Franks Bros.* case properly subordinated the employees' freedom of choice for a period in order to safeguard against "a stubborn refusal to abide by the law," so here, we submit, the Board has appropriately restricted for a time the employees' freedom of choice in order to achieve another and equally important statutory purpose—stability in labor relations.

2. It is urged, however, that the Board's rule, suspending for a period the employees' right to repudiate a bargaining representative, is at odds with orthodox agency concepts which permit conventional principals to revoke at will the authority of their agents. See Pet. Br. 5 *ff.*; *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856; and dissenting opinion of Mr. Justice Rutledge in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 696. But this contention overlooks the

important factor that in the Act Congress has provided for relationships "not only unknown to the common law but often in derogation of it" (*National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 182 (C. A. 6)). Hence, as Mr. Justice Rutledge, speaking for this Court, said, in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 125: "It will not do, for deciding this question * * *, to import wholesale the traditional common-law conceptions * * * as exclusively controlling limitations upon the scope of the statute's effectiveness." Thus, for example, in *Medo Photo, supra*, the argument was advanced that an employer could lawfully by-pass the designated bargaining representative and deal directly with the employees because under common law concepts "any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves" (321 U. S. at 696). This Court, giving decisive weight to the scheme of collective bargaining envisaged by the Act, rejected the argument, saying, "The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent * * *" (321 U. S. at 687).

The Act is, after all, a labor relations statute, concerned with the adjustment through collective bargaining of disputes arising out of differences as to wages, hours, or working conditions. Necessarily, the measure of permanence to be accorded to the designation of a bargaining representative must be determined with reference to the purpose of the Act and its practical operation. Congress could not have intended that the resolution of this problem was to turn solely upon technical common law concepts developed in a context wholly unrelated to the Act's purpose and provisions. Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 120–129. Indeed, Section 9 (a) of the Act (*infra,* p. 55) reflects the Congressional purpose to avoid any strict application of conventional agency rules to the representation procedures of the Act. Under that provision the representative designated by a majority of the employees in the appropriate bargaining unit is the exclusive representative of all of the employees in the unit and is under a statutory obligation to represent all of them. *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337. If orthodox agency principles controlled, the union would neither be vested with such power nor subject to that obligation.[14]

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[14] Section 2 (13) of the Act does not militate against this conclusion. That section provides:

"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible

It has also been suggested that while in the case of a large group of employees "a reasonable degree of stability in employment relations may require, to give the statute workable operation," that the representative status of a bargaining agent be valid and conclusive for a reasonable period, such a limitation upon the employees' freedom can have no application to a small group, as here, whose wishes may be easily and readily ascertained at any time. See Mr. Justice Rutledge dissenting in *Medo Photo, supra.* But the problem is not one of proof. Rather, it is one of effectuating the statutory policy of insuring a reasonable degree of stability in industrial relations. The "workable operation" of the statute is as much hampered by instability in small units as in larger ones and, bearing in mind the objective to be attained, the Board is not compelled to distinguish between the two.

Finally, it is asserted that it "would seem to be the antithesis of the stabilization of labor relations" to compel employees to bargain through a representative which they have repudiated. *Mid-*

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for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The legislative history of this provision indicates that its purpose was to make the ordinary "law of agency as it has been developed at common law" the controlling test for determining employer or union responsibility for misconduct under the Act. 93 Cong. Rec. 6858–6859. The legislative history, as well as the text of Section 2 (13), clearly establish that it has no relevance to the issue presented here.

Continent Petroleum case, *supra*, 204 F. 2d at p. 622. This assertion rests, apparently, upon the premise that the repudiated representative may not be fully responsive to the employees' wishes and that the employees will therefore become restive. This fear would appear to be more speculative than real. The representative is, of course, under an enforcible statutory obligation to make "an honest effort to serve the interests" of all whom it represents and "is responsible to, and owes complete loyalty to" those interests. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337–338. See also *Steele* v. *Louisville & Nashville Co.*, 323 U. S. 192, 201–202. The Board itself, in exercising its power to determine and certify bargaining representatives under Section 9 of the Act, has asserted its correlative power to police and revoke certifications in the face of various forms of conduct held incompatible with the representatives' duties. *Hughes Tool Co.*, 104 N. L. R. B. 318; N. L. R. B., *Eighteenth Annual Report*, 1953 (Govt. Print. Off. 1954), pp. 19–20. And it would scarcely be in the self-interest of the representative to be derelict in the discharge of its obligations and to fail to give adequate heed to the wishes of the employees because it was currently in disfavor with a majority of them. Indeed, practical experience would suggest that in those circumstances the representative might well intensify its efforts to carry out the wishes of its

constituency and thereby regain its favor.[15] Moreover, it is commonplace in our society for political bodies, social clubs, groups and organizations of all types to function through representatives, officers, or managers elected for a stated period—even though those functionaries would be ousted if an interim or "spot" election were held at the particular moment. The device of the "recall" has not yet become established in our political or social structure.

C. CONGRESS, IN THE AMENDED ACT, RECOGNIZED AND APPROVED THE BOARD'S "REASONABLE PERIOD" RULE

The amended Act and its legislative history demonstrate, we believe, that Congress approved and ratified the Board's long-established rule that the election of a bargaining representative is valid and conclusive for a reasonable period of time, usually one year.

The amendments to the Act adopted by Congress in 1947 and 1951 reflect on their face the legislative purpose to give a measure of permanence to a Board certification of bargaining representatives and to hold the employees to their choice for a reasonable time.[16] Thus, Section 9 (c) (3) (*infra,*

[15] "It should always be remembered that almost always the negotiators have two or three audiences: there is the opposing side, the home constituency, and the general public. It is always thus with legislators and representatives." Daugherty, Carroll R., *Labor Problems In American Industry* (5th ed., 1941) p. 450. See also Gardner, B. B. and Moore, D. G., *Human Relations In Industry* (1950) pp. 136–148.

[16] The employees in the instant case repudiated the Union immediately after the election but before the Board's certifi-

p. 57) provides: "No election shall be directed [by the Board] in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." [17] In order to protect the certified union in its representative status, and again demonstrating the measure of respect to be accorded to a Board certification of representatives, Congress in Section 8 (b) (4) (C) (*infra*, pp. 53–55) made it an unfair labor practice for a union to engage in a strike for the purpose of forcing or requiring any employer to bargain with a particular labor organization ~~unless such~~ another organization has been certified as the representative of such employees pursuant to the provisions of Section 9. Congress also provided that the 1947 amendments should not affect any certification of representatives which was made under Section 9 prior to the effective date of the amended Act until one year after the date of such certification. Section 103, *infra*, p. 58.

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cation issued. This factor does not affect the argument here. The certification merely certifies the election results. The warrant for the Board's rule is not that the Board specifically issued a certification but rather, as we have sought to demonstrate *supra*, that once the employees have formally signified their choice in a Board conducted election, the public interest in preserving stable industrial relationships requires that they be held to it for a reasonable time.

[17] If petitioner were correct in his position, he would be freed from bargaining with the Union, but for the rest of the certification year no new election could be held to determine a bargaining representative.

Congress' purpose to give validity and finality for a reasonable period to Board elections is also reflected in the union security amendments adopted in 1947 and 1951. Under the 1947 amendments the employees' bargaining representative could enter into a union security agreement with the employer, as permitted by the Act, provided that the employees by secret ballot in a Board conducted election authorized the union to execute such agreement. The amendments further provided that not more than one valid election might be held in a 12-month period for the purpose of conferring such authority upon the bargaining representative or rescinding it. Section 9 (e) (1), (2) and (3), *infra*, pp. 57–58. Although under the 1951 amendments to the Act it is no longer necessary to conduct such a vote for that purpose,[18] the Act as it now stands provides that, where there is in effect a union security agreement, the Board, upon appropriate showing, shall conduct an election to determine whether the employees desire to eliminate the union security provisions of the agreement. Such elections, like elections under Section 9 (c), cannot be held more often than once a year. Section 9 (e) (2), *infra*, p. 58.

Following the 1947 amendments, the Board in 1949 reported to Congress and to the President that "Section 9 (c) (3) of the amended statute, which proscribes the holding of more than one

[18] Act of October 22, 1951, 65 Stat. 601–602.

valid election in a bargaining unit or any subdivision thereof in a 12-month period [for the purpose of designating a bargaining representative], amounts in part to a codification of the Board's 1-year certification rule."[19] The legislative history of that Section confirms that report.

The debates on the amendments and proposed amendments, as well as the committee reports in both the Senate and the House, disclose that Congress was fully familiar with the Board's one-year rule and after the most careful deliberation approved it. Thus, Senator Taft, urging the adoption of Section 9 (c) (3), explained (93 Cong. Rec. 3838):

> The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. *The men choose a bargaining agent for one year. He remains the bargaining agent until the end of that year.* [Emphasis added.]

And the Senate Report (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25) stated that:

> This amendment prevents the Board from holding elections more often than once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having received a majority. At present, if the union loses, it may on pre-

[19] N. L. R. B., *Thirteenth Annual Report*, 1948 (Govt. Print. Off. 1949), p. 31.

> sentation of additional membership cards secure another election within a short time, but *if it wins its majority cannot be challenged for a year.* [Emphasis added.]

Significantly, too, the Report added (p. 25) that the amendments to the Act did not effect "the present Board's rules of decisions with respect to * * * the existence of an outstanding collective agreement as a bar to an election." [20]

These Senate statements confirming the Board's 1-year certification rule are paralleled by the corresponding history in the House. The House bill prohibited more than a single valid election in the course of a year, *except upon the petition of employees requesting decertification of a bargaining representative.* H. R. 3020, 80th Cong., 1st Sess., Secs. 9 (f) (7), 9 (c) (2) (April 11, 1947); H. Rep. No. 245, 80th Cong., 1st Sess., 39. This provision was severely criticized on the floor of the House because it negatived "present law" by which "a certification is presumed to be valid for a reasonable period of time—normally a year." "This [proposed] provision," it was argued, since it permits employees to repudiate their representative within the certification year, "plays havoc with stability of relationships."

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[20] The Board has held that, in general, a valid written collective bargaining agreement constitutes a bar to a current determination of representatives among the employees covered by the contract until shortly before its terminal date. N. L. R. B., *Twelfth Annual Report*, 1947 (Govt. Print. Off. 1948), p. 9; *Eighteenth Annual Report*, 1953, p. 13.

93 Cong. Rec. 3446–47; see also, 93 Cong. Rec. 3528. To the extent that it permitted decertification within the certification year, this provision was thereafter eliminated in conference, the House conferees explaining that the "conference agreement adopts the provisions of the Senate amendment." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49. Thus, Section 9 (c) (3) as adopted by Congress retained in full the long-applied underlying principle that "In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, * * * elections in any given unit may not be held more frequently than once a year." S. Rep. No. 105, 80th Cong., 1st Sess., p. 12. In this fashion Congress, consistently with its basic approach to the representation procedures of the Act (*supra*, pp. 24–25, 31–32), once more manifested its intention to make representation elections "conform more closely to public elections." *Id.*

The legislative history thus establishes that Congress was well aware of the "reasonable period" rule adopted by the Board and almost uniformly approved by the courts; that it was the object of explicit mention and approval in Congress; and that Section 9 (c) (3) was designed, as the Board subsequently reported, to codify that rule (*supra*, pp. 41–42). Even if that purpose cannot be attributed to Section 9 (c) (3), it is a fair inference from all the circum-

stances, as the court below pointed out (R. 79), that Congress accepted this administrative and judicial construction of the Act. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, 366; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C. A. 6), certiorari denied, 342 U. S. 859; *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161 (C. A. 7). It is therefore with the firmest legislative basis that, since the enactment of the amended Act in 1947, all but the Sixth Circuit of the courts of appeals which have had occasion to consider the issue have expressed approval of the Board's "reasonable period" rule. *National Labor Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 69 (C. A. 3); *National Labor Relations Board* v. *Sanson Hosiery Mills*, 195 F. 2d 350, 352, 353 (C. A. 5), certiorari denied, 344 U. S. 863; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 792 (C. A. 7), certiorari denied, 340 U. S. 930. See also *supra*, pp. 25–27.[21]

[21] In the *Globe Automatic Sprinkler* case, *supra* (heavily relied on at Pet. Br. 8, 10–11), the Third Circuit, although approving of the "reasonable period" rule, declined to apply a rigid one-year period in a situation where the employer in good faith challenged the union's representative status three weeks before the expiration of the certification year.

In this connection, it may also be pointed out that the

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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Sixth Circuit in *Mid-Continent Petroleum* (*supra*, p. 26), in rejecting the Board's rule, failed to recognize any distinction between a bargaining representative whose status is established through a Board-conducted election and one established by other, informal means (see fn. 12, *supra*, p. 23), or any distinction between defections occurring within the certification year and those occurring later. Thus, in support of its position it cited indiscriminately cases in which the majority had been established by a check of union membership cards (*National Labor Relations Board* v. *Holly-*

wood-Maxwell Co., 126 F. 2d 815 (C. A. 9); *National Labor Relations Board* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (C. A. 6); *National Labor Relations Board* v. *Mayer*, 196 F. 2d 286 (C. A. 5)) and a case in which the certification was more than ten years old (*National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C. A. 7)). In one other case cited by that court, *National Labor Relations Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C. A. 4), less than a year after the certification had elapsed when it appeared that following a reorganization of the employer's business the union no longer represented a majority. However, the Fourth Circuit on petition for rehearing made clear that its decision was limited to the "peculiar facts" of that case (unreported order of the U. S. Court of Appeals dated May 7, 1946, in case Docket No. 5440); and subsequently that court in *National Labor Relations Board* v. *Borchert*, 188 F. 2d 474, 475, enforcing in part 90 NLRB 944, again cited with approval its prior holding in *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, which expressly approved the Board's rule.

APPENDIX

1. The relevant provisions of the National Labor Relations Act as originally enacted (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. (1946 ed.), 151, *et seq.*), are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to

aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties,

in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

2. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of

contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this

Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights

guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:
* * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

(c) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify

the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

SEC. 9. * * *[1]

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect to any such

[1] As amended by the Act of October 22, 1951, 65 Stat. 601–602.

certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

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IN THE

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NO. 21

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

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INDEX

CITATIONS

Cases:

Statutes:

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Interest of Amici Curiae

The American Federation of Labor and the Congress of Industrial Organizations together are federations of unions representing approximately sixteen million employees. These unions are repeatedly confronted with the problem faced by the International Association of Machinists, District Lodge No. 727, in the case at bar, namely, whether an employer can ignore a Board certification, issued after a secret ballot election, because of a claimed repudiation of the union, as evidenced by a petition or similar non-secret poll of the employees. Indeed, in this and most of the cases hereinafter cited, the unions which had obtained certifications from the National Labor Relations Board, only to be met with employer claims that the union had subsequently

lost its majority, were affiliates of the A. F. of L. or the C.I.O.

Reason for Filing This Brief

We believe that the Board in the instant case properly ordered the employer to bargain collectively with the union and we argue, therefore, in support of the judgment below as does the Board. This brief is not being filed, however, merely to "back-stop" the Board or to repeat arguments made by it. It is filed because examination of the Board's brief by counsel for the A. F. of L. and the C.I.O. after it was filed disclosed, for the first time, that the Board was not resting its case in this Court upon what we believe are the relevant provisions of the Act and that therefore an important question of law raised by the facts of the case was not adequately, or indeed at all, presented by the parties. This brief represents an effort to set forth this unargued question and the reasons why we believe that it should be the basis for decision in this case. The brief is filed with the consent of the parties.

The Question of Law Which Is Not Presented by the Parties

In this case an election was conducted by the Board in which a majority of the employees in the appropriate bargaining unit selected a union as their bargaining representative. A week after the election was held a document was presented, signed by a majority of the employees, stating that they did not wish the union to represent them; the employer thereupon refused to deal with the union.

The "single question" (Bd. Brief, p. 12) presented by these facts, according to the Board, is whether the employer was required to bargain collectively with the union "despite this repudiation of the union by the employees." (Bd. Brief, p. 2.) The Board argues at length that a reasonable compromise between the desirability of giving effect to the wishes of the employees and the necessity for stability in industrial relations requires that for a "reason-

able period" of time the employer should not be entitled to refuse to bargain because of a change in employee sentiment. Many cases, most of them prior to the 1947 amendments, are cited in support of this "reasonable period" rule and it is argued that the rule was recognized and confirmed by the 1947 amendments to the Act.

The Board's brief makes only incidental reference to one of the fundamental changes in the Act made by the 1947 amendments: the specific provision in Section 9(c) of a procedure for revoking a certification by holding an election in which employees who wish to repudiate the union which they have previously chosen may obtain a secret ballot election with all of the safeguards which were contained in the original selection of the union.[1] The Board's brief makes no reference at all to *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563 (1950), in which this Court construed these new provisions as providing the exclusive method for attacking a Board certification and said that any attempt to claim a loss of majority status in an enforcement proceeding "subverts the statutory mandate to leave these matters to the Board in separate proceedings under §9(c)." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. at 568 (emphasis added).

The question which the Board presents is whether, when a union has been certified after a secret ballot election under Section 9(c), an employer is precluded for a reasonable period of time from relying on a shift in employee sentiment as a justification for refusing to bargain. The question which we believe is presented by this case is whether, under those same circumstances, the employer is required to bargain with the certified union until it is shown by the secret ballot vote which is now also provided for in Section 9(c) as a method of decertification, that the employees no longer

[1] Indeed, in stating that "the device of the 'recall' has not yet become established in our political or social structure" (Bd. Brief, p. 39) the Board seems to assume that there is no such decertification procedure.

wish the union to represent them.[2] To put the matter in other words, the Board in its argument here, although not in its formal decision[3] assumes that the document signed by the employees in this case is a reliable reflection of their desires with respect to the union and then poses the question of whether the Board and the courts should give effect to those desires. The question which we assert is presented is whether the document presented in this case, or any other method of expression of opinion other than the secret ballot election, provided for by the Act, can be regarded as competent evidence of the employees' desire to repudiate a union which they have just chosen in a secret ballot.

SUMMARY OF ARGUMENT

1. The amended Act provides that any time after the end of one year a certification of a union may be challenged in election proceedings instituted by employees or another union either to change representatives or to decertify the union. By providing only this one method for terminating a certification Congress has excluded other methods. An employer accordingly is under a duty to bargain with a certified union until the certification is revoked by Board decertification or by Board certification of another union.

2. The legislative history of the decertification provision of the amended Act establishes that Congress was dissatisfied with the Board's previous handling of the problem of alleged losses of majority and that Congress desired to

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[2] The reason that the Board has put the question in the way it has may be due to the assumed necessity of justifying the decision in *Matter of Celanese Corporation of America*, 95 NLRB 664 (1951). For the reasons set forth hereinafter we believe that reasoning of the Board is erroneous.

[3] The Board's decision, 98 NLRB 976, adopted the Trial Examiner's Intermediate Report which relied in part (R. 14-16) on the absence of proof as to the signatures on the repudiation petition as highlighting "the Board's policy in attributing such great weight to the desires of employees when expressed in the privacy of the voting booth." 96 NLRB at 982.

institute a change. Sponsors of the decertification procedure believed that, without this procedure, employees could never rid themselves of a union except by choosing a new union. The sponsors intended that the new decertification election procedure should provide the exclusive exception to the previous inability to terminate a certification without choosing a new union.

3. This Court and the United States Courts of Appeals for the Fourth, Fifth and Seventh Circuits have construed the decertification provision of the amended Act as depriving employers of any standing to challenge a union's continued representative status except by filing a petition for an election. As a necessary corrollary it follows that the employer must respect a certification until it has been revoked in a decertification election or another union certified.

4. According a certification continued validity until it is revoked by Board decertification or by certification of another union affords a fair and workable system of collective bargaining. It eliminates the uncertainty inherent in the Board's suggested system. It eliminates the temptation to employers to encourage informal repudiations of the union which the Board's system invites.

ARGUMENT

I. The plain provisions of the National Labor Relations Act, as amended, impose upon an employer the duty to bargain collectively with a certified union until the certification is revoked by Board decertification or by Board certification of another union.

The application of accepted rules of statutory construction to the 1947 amendments to the National Labor Relations Act requires the conclusion that Congress intended that once a union has established its majority designation in a Board conducted election the union's status should continue until another majority choice, either of no union or of another union, is registered in another Board conducted

election. This follows from the fact that the amended Act not only provides a specific method for decertifying a union, namely, by an election conducted by the Board, but also contains certain limitations which must be met before this method can be utilized. The Congressional purpose in setting forth these limitations would be frustrated if another method of decertification were permitted.

The pertinent provisions of the Act are in Section 9(c) of the Act and (reparagraphed for clarity) read as follows:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees

(i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

Examination of these provisions and comparison with the provisions of Section 9(c) of the Act prior to amendment (49 Stat. 453, 29 U. S. C. (1946 ed.) 159) discloses the following significant points:

(1) Election by secret ballot is required in all cases by the amended Act, while under the original Act certification could be made by the Board after utilization of "any other suitable method."

(2) The original Act covered all cases in which "a question concerning the representation of employees" arose. The Board, however, would only entertain petitions for certification filed by a union or employer petitions where two or more unions were making mutually exclusive claims for recognition. *Tabardrey Manufacturing Co.*, 51 NLRB 246. See S. Rept. No. 105 on S. 1126, 80th Cong., 1st Sess., 10-11 (1947). Under the amended Act, employees can file petitions asking for the decertification of a union which has previously been certified or recognized by the employer. Furthermore, employer petitions can be filed when "one or more" organizations have claimed to be the collective bargaining representative of the employees.

(3) Under both Acts, the Board is not required to act unless it finds that a "question of representation" exists. The amended Act did not, therefore, impair the Board's discretion to dismiss petitions "where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate." *Id.* at 11.

(4) Under the amended Act, an election cannot be held on either a certification or a decertification petition until one year has elapsed since the last valid election within the bargaining unit. The "reasonable period" rule which the Board had developed under the original Act was thus not only recognized and approved but, in fact, firmly written into the statute as a limitation on the holding of elections.

These four points taken together mean that if a substantial number of employees wish to repudiate a union which

they have chosen in a secret ballot election they can accomplish this by filing a petition with the Board. If the Board finds that there is a question of representation and that there is no outstanding contract or other special condition, and if no election has been conducted for a year, then the Board can proceed to ascertain the wishes of all of the employees in the unit. But it must do so, not by a "suitable method" but by "an election by secret ballot."

Every consideration which led Congress to specify these terms and conditions for a decertification petition would also require, we submit, that the result of decertification—the termination of the employer's duty to bargain—cannot be achieved except through the method provided in the Act.

II. The legislative history of the decertification provision of the National Labor Relations Act, as amended, shows that Congress intended that this decertification procedure should provide the exclusive method for repudiating a certified union.

In order to give proper recognition to the intention of Congress in making the 1947 amendments to Section 9(c) it is necessary to examine the prior law and to unscramble some history which the Board's brief has, we believe, confused.

The original National Labor Relations Act, as well as its precursor, the Railway Labor Act of 1926, and the amendments thereto of 1934, made no specific provision for decertification of unions. And under neither Act were unions decertified. Indeed from 1926 to date, under the Railway Labor Act as interpreted and applied by the National Mediation Board, by the carriers and by unions, once a union has been certified it is impossible for the employees thereafter to assume an unorganized state unless the certified union voluntarily relinquishes its bargaining status and no other union claims recognition. A certified union continues to hold its status indefinitely and only by selecting

another union can that status be lost involuntarily.[4] In *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548 (1930), a case arising under the Railway Labor Act of 1926, this Court affirmed a court decree which required the carrier to recognize the Brotherhood as the representative of its clerical employees until such time as these employees by a secret ballot taken in accordance with the further direction of the Court should choose other representatives (281 U. S. at 557).

The old National Labor Relations Board, operating under Public Resolution No. 44, 73d Cong. (H. J. Res. 375), expressly followed the analogy of the *Texas & New Orleans* decree and issued its bargaining orders in terms which required bargaining with the certified union until some other representative should be chosen in a Board conducted election. *Matter of North Carolina Granite Corp.*, 1 (old) NLRB 89, 92 (1934). Similarly in *Matter of International Association of Oil Field, Gas Well and Refinery Workers and Lion Oil Refining Co.*, Dec. Petroleum Labor Policy Bd. 34, 37 (1934), it was held that certification based on a Board election could only be terminated by the rejection of the union in another Board election.

During the hearings and debates which preceded the original National Labor Relations Act, Senator Wagner repeatedly referred to this aspect of the *Texas & New Orleans* decree.[5]

Under the original National Labor Relations Act, it was established by decisions of this and other courts that once a union had established its majority, it must be recognized

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[4] We know of no printed source for this information respecting this practice under the Railway Labor Act but the practice is well known and accepted in the railroad field, and counsel for *amici curiae* have confirmed this information by calling the office of the Executive Secretary of the National Mediation Board.

[5] Hearings before Committee on Education and Labor, Senate, on S. 1958, 74th Cong., 1st Sess., pp. 52-53; Hearings before Committee on Labor, House, on H. R. 6288, 74th Cong., 1st Sess., pp. 21-22; 79 Cong. Rec. 7571.

until the Board made a new determination of bargaining agent. In *Franks Bros. Co. v. NLRB*, 321 U. S. 702, 705 (1944), the language repeatedly quoted in the Board's brief here (Bd. Br., pp. 9, 25, 33-34), as showing approval of the Board's fixing of a reasonable time for the duration of a certificate, when read in context, refers not to the termination of the employer's duty to bargain but, rather, to the Board's right to defer for a reasonable period a new determination of representatives by it. The duration of the union's status was not merely for the reasonable period but rather until the Board in appropriate proceedings determined that there was a change in bargaining agents. Thus this Court there said (321 U. S. at 705-706):

> "* * * But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. *See National Labor Relations Board* v. *Appalachian Power Co.*, 140 F. 2d 217, 220-222; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881-882. *After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. Id.; see 29 U.S.C. § 159 (c).*" (Emphasis added.)

The decision in *NLRB* v. *Botany Mills*, 133 F. 2d 876 (C. A. 3, 1943), certiorari denied 319 U. S. 751, cited in the above quoted portion of this Court's opinion, likewise clearly fixes the duration of a certification as having a terminal point only upon the Board certification of a change in majority designation. There the Court of Appeals for the Third Circuit said (at pp. 881-882):

> "* * * The Board was empowered by the statute to make rules and regulations for its procedure for the same reason. The Board has within its authority power to ascertain the will of the majority of a given group of employees by election or other means. The election method is chosen, we take it, because secret

> ballot is regarded as the most effective way of getting an untrammeled expression of the desire of the electorate. Surely it is not to be defeated of all its effectiveness by a communication, undisclosed to the Board, repudiating, immediately after the election was held, the ballot count. The employees in this case, if they wished to change their minds concerning a bargaining agent, could have asked the Board for another election. If the Board had arbitrarily refused it within a reasonable time then we might have a case where a question could be raised whether it had done its duty under the statute. * * *"

The courts subsequent to the *Franks* decision and prior to the 1947 amendments, read the *Franks* decision as requiring that a Board certification be honored until the Board certified a change. Thus see *NLRB* v. *Prudential Insurance Co.*, 154 F. 2d 385, 390 (C. A. 6, 1946) where the Court of Appeals for the Sixth Circuit said:

> "* * * Until such changed conditions are reflected by a later ruling of the Board, or by arbitrary refusal to act after a reasonable time, a valid existing certification must be honored. The respondent had no right to make the ruling that changed conditions invalidating the existing certification, such right being exclusively in the Board. *Franks Bros.* v. *N.L.R.B., supra; N.L.R.B.* v. *Appalachian Electric Power Co., supra.*"

These decisions were severely criticized by law review commentators and text writers on the ground that the Board construed the Act as not authorizing decertification proceedings. It was therefore urged the Act should be amended to provide for decertification elections. A note on *NLRB* v. *Appalachian Electric Power Co.*, 140 F. 2d 217 (C. A. 4, 1944) entitled "Duty of Employer Who Had Committed No Unfair Labor Practice to Bargain with Certified Union after Employees Have Revoked Designation of Union as Their Bargaining Agent," 30 Va. Law Rev. 344, 345-346 (March, 1944) states:

> "* * * the instant case does not seem to permit re-

fusal to bargain until the Board itself takes action, through a formal redetermination of majority status. * * *

"In order to balance the desirability of stability in bargaining with the employees' freedom of choice of representatives, the Board refuses to entertain representation petitions within a reasonable period after an election. *Matter of Century Oxford Mfg. Corp.*, 47 NLRB No. 103 (1943). For administrative reasons, the minimum reasonable time is one year. See *Matter of Monarch Aluminum Mfg. Co.*, 38 NLRB 404 (1943). Non-union employees cannot petition for a redetermination of a union's majority status. *Matter of Tabardrey Mfg. Co.*, 51 NLRB No. 54 (1942). Thus it would appear that as a result of the decision in the instant case the Board hereafter will not entertain for at least a year a claim by the employer that the union does not represent the will of a majority of the workers and not even then unless the workers who have repudiated the existing union form or join another union. * * *"

Similarly see Iserman, Industrial Peace and the Wagner Act (1947), pp. 28-29:

"*Unions Given Long-Lasting Control.* Once a group of employees has become subject to control by a union through its right to bargain for them as their exclusive agent, it is hard for them to escape that control. Ordinarily, they do not succeed without finding themselves subject to control by another. This tends to keep up membership in the union movement but to limit the freedom of workers to choose whether to bargain for themselves or to subject themselves to the power of a union as their exclusive bargaining agent.

"Employees subject to unions as their exclusive bargaining agents under the Act sometimes have found the benefits they hoped for not forthcoming, or that the union neglected them or that what it exacted from them in one form or another was more than the benefits they received.

"The Act would seem designed to provide for employees in such a case applying to the Board for relief. It says the Board shall act whenever a question affect-

ing commerce arises concerning the representation of employees. But under this clause, the Board acts only to determine whether employees wish a union to represent them, not to determine whether they do not wish a union to represent them. Either question seems to be one 'concerning representation,' but the Board says it will 'pay no heed to employees' petitions' in the latter case.

"Apparently the only way employees can escape a union's control over them once it has become their exclusive bargaining agent is to subject themselves to control by another union and get it to apply for an election. Even then, the Board may deny the request.[9] The Board seems to be moving in the direction of restricting more and more the freedom of employees, making it harder and harder for them to rid themselves of control by a union once they have given it power over them.[10]

"Were employees to ask their employer to deal with them and not with the union certified as their bargaining agent, on the ground that the union no longer represented the majority, and were the employer to grant that request, the Board at the request of the certified union probably would find the employer guilty of an unfair labor practice. If the employer finds this risk too great to run, the employees are helpless.

"[9] *Matter of Electric Sprayit Company*, 67 N.L.R.B. No. 161 (1946); *Matter of Aluminum Company of America*, 57 N.L.R.B. 913 (1944); *Matter of Bohn Aluminum & Brass Corp.*, 57 N.L.R.B. 1684 (1944); *Matter of Kennecott Copper Corp.*, 51 N.L.R.B. 1140 (1943); *Matter of E. T. Fraim Lock Co.*, 24 N.L.R.B. 1190 (1940); *Matter of Forrest City Cotton Oil Mill*, 48 N.L.R.B. 90 (1943); *Reilly* v. *Millis*, 144 Fed. (2d) 259 (Ct. App., D. C., 1944), cert. denied in 325 U. S. 879 (1945).

"[10] See: *Matter of Midwest Piping Co.*, 63 N.L.R.B. 1060 (1945); *Matter of Mississippi Lime Company*, 71 N.L.R.B. No. 71 (1946); *Matter of General Electric X-Ray Corp.*, 67 N.L.R.B. No. 121 (1946); *Matter of Northwestern Publishing Company*, 71 N.L.R.B. No. 20 (1946)."

During the hearings that preceded adoption of the 1947 amendments of the Act these criticisms were voiced repeatedly as the basis for urging that the Board be required to hold decertification elections. Jerome V. Morrison, the

president of an employer company which had been ordered to bargain with a union despite repeated petitions signed by a majority of employees repudiating the union, described his experiences with the Board. He did not argue that employers should be allowed to judge for themselves the validity of such petitions, as the employer does here, but merely urged that the Act should be amended to afford employees a procedure for checking by a secret election conducted by the Board whether a majority continued to desire union representation. The pertinent part of his recommendation is as follows:[6]

> "Mr. Barela explained to me that the petitions of our employees were of no value because they did not come from a union demanding to represent the employees in collective bargaining. * * *
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> "* * * To me, gentlemen, this means that the National Labor Relations Board will do everything it can to get employees into a union and to get a union into a plant, but when the employees want to get out of the union, the Board will not even listen to them.
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> "* * * on July 9, 1946, we asked the National Labor Relations Board for a review and a decision. We received their answer on July 23 when they denied our request.
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> "This left the union in possession of the legal right to represent all of our employees in spite of the fact that a majority had twice petitioned, saying they no longer wanted to be represented by this union. I want to say to your committee that this situation is the direct result of two things that Congress should correct:
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> "1. As the law now stands, members can choose a union to represent them, but once having done so, they cannot choose to drop the union and to deal individually with the employer.
>
> "2. Under the law, the employer can ask for an election only if two or more unions are involved. Our case was clearly one where the question was not between two unions, but was whether a majority of our employees

[6] Hearings before Committee on Education and Labor, House, 80th Cong., 1st Sess., vol. 2, pp. 245-246.

wanted to deal through a union or to deal without a union.

"I suggest to your committee that the law should be corrected so that employees have the right to disavow a union, just as they now have the right to choose one. It should also be corrected so that when there is an honest question as to the wishes of the employees there can be a secret election held to permit them to express their desires and that it should not be limited to a fight between two unions.

"It seems to me also that in spite of the weaknesses in the present law much of the trouble in our case came from bad administration of the law by the National Labor Relations Board. Our lawyers tell us that although the Wagner Act does not specifically provide a way for the employees to disavow a union, neither does it prohibit the Board from holding an election for this purpose. If the Board were not definitely pro-union, it seems to me that they would have been glad to give our employees the right to express their wishes in a democratic American way."

Similarly, Theodore R. Iserman, attorney for various employers, whose text criticizing the Board has already been quoted, testified:[7]

"5. Once the Board has certified a union as bargaining agent for a group of employees, it is virtually impossible for the employees to escape control by that union without subjecting themselves to control by another.

"The Board says it will 'pay no heed' to petitions by workers to have certifications withdrawn or revoked. Congress should compel the Board to accept such petitions and to act upon them without in any way discriminating against the petitions or against the people filing them.

"There should be a provision in the act that permits employees to petition the Board for decertification of

[7] Hearings before Committee on Labor, House, 80th Cong., 1st Sess., p. 2724; see also Hearings before Committee on Labor and Public Welfare, Senate, 80th Cong., 1st Sess., on S. 55, Pt. I, pp. 154-156.

> unions. I have four plants in which the employees have bargaining agents under the Wagner Act. In all four plants, they do not want the bargaining agents any more, but the only way they can get rid of them is to get another bargaining agent."

Instead of urging decertification elections two witnesses appearing before congressional committees, urged periodic elections—annually or biennially—to redetermine representatives.[8]

It is in the light of this state of the law and of this kind of criticism that the legislative action of 1947 must be viewed. That action itself confirms the view that Congress recognized the earlier cases as establishing a certified union's status until another Board election was conducted and that decertification was provided as the exclusive method of repudiating a certified union.

The House Report on the bill which became the 1947 amendments to the Act stated:[9]

> "Although the terms of the act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the right to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this right of which the Board deprived them. If they engage in collective bargaining through an exclusive representative and the experience proves disappointing, 30 per cent of them can ask for an election in which the majority can withdraw their designation of the representative."

The bill which passed the House, as the Board points out in its brief, differed from the bill finally enacted in that it not only provided for decertification elections, but also exempted these elections from the proposed provision for-

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[8] Statement of Paul S. Chalfant, Hearings House Committee, *op cit*, pp. 2618-2619; Statement of Charles S. Craigmile, Hearings Senate Committee, *op cit*, p. 517.

[9] H. Rep. 245, 80th Cong., 1st Sess., on H. R. 3020, p. 35.

bidding elections more frequently than once a year. H. R. 3020, 80th Cong., 1st Sess., Secs. 9(f)(7), 9(c)(2). As the Board also points out (Bd. Br., pp. 43-44), this exception was subject to severe criticism. The Senate bill did not contain it. The Senate provisions, which were finally adopted in conference (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49), set forth the decertification procedure without making any exception to the one-year rule.

Senator Taft stated, with reference to these provisions (93 Cong. Rec. 3838):

> "We provide, further, that there may be an election asked by the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union. An election under this bill may be sought to decertify a union and go back to a nonunion status, if the men so desire.
>
> "* * * The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for one year. *He remains the bargaining agent until the end of that year.*" (Emphasis added.)

The conclusion to be drawn from this history, we think, is that Congress assumed that under the original Act there was no way in which an employer could recognize the desire of his employees to dispense altogether with a certified union representative. When presented with this problem Congress did not attempt to permit employers to go behind the certification or to allow them to recognize employee sentiment expressed in ways other than a Board conducted election, either within a reasonable period or after. It provided, instead, for a decertification procedure. The Board's "reasonable period" rule was embodied in the limitation on the decertification procedure. Those who wished to permit employees to repudiate a chosen union at any time sought to accomplish that result by exempting decertification elections from the one-year rule. Those who, on the other hand,

wished to assure that a bargaining representative would retain that status "until the end of that year" did so by making the one-year rule applicable to decertification proceedings. The implicit assumption of both sides to that controversy, we submit, was that until a decertification election was held the collective bargaining status of the certified union remained in effect. Both houses recognized that only by a secret election could a fair determination be made as to whether the employees desired the certification to continue in effect or to be terminated.

III. This Court and the United States Courts of Appeals for the Fourth, Fifth and Seventh Circuits have construed Section 9(c) of the amended act as providing the sole method of questioning a certified union's continued status as bargaining representative.

In *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563 (1950) a union had been certified in 1944. In 1947 the union filed a charge under Section 10 of the Act complaining that the employer refused to bargain with it. The Board so found. When the Board in 1949 sought enforcement of its resultant order to bargain, the employer sought to have evidence taken as to the union's continued status as the representative of the majority of the employees. This Court held that the taking of such evidence was improper. This result could have been rested on the theory that the employer should have raised the issue as to the union's status in the unfair labor practice proceedings before the Board under §10, a "reasonable period" having elapsed since the certification. But it was not. To the contrary, the Court held that the availability of the "separate" procedures for obtaining a secret ballot under Section 9(c) was the reason why the employer could not raise doubts as the union's status. The Court said (at p. 568):

> "* * * Under 9 (c) of the Act 'an employee or group of employees or any individual or labor organization acting in their behalf' may 'assert that the individual

> or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a) * * *.' §9(c)(1)(A)(ii). Petitions by the employer concerning selection of bargaining representatives are limited to those 'alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a) * * *.' §9(c)(1)(B). To authorize the employer to assert diminution in membership in the certified union in an enforcement proceeding subverts the statutory mandate *to leave these matters to the Board in separate proceedings under §9(c).*" (emphasis added.)

This flat holding that the procedures of Section 9(c) are the exclusive method of resolving doubts as to a certified union's continued status has been followed by the Courts of Appeals for the Fourth, Fifth and Seventh Circuits.

In *NLRB* v. *Sanson Hosiery Mills*, 195 F. 2d 350 (C.A. 5, 1952), certiorari denied, 344 U. S. 863, the union was certified in May of 1947. The employer refused to bargain with the union in November, 1948, claiming, on the basis of a petition, that the union no longer represented a majority. The Board found this a violation of the Act and the Fifth Circuit agreed:

> "* * * Such a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or setting aside the certification. This is true, even though the bargaining agent so designated has lost its majority representation of the employees by reason of the subsequent defection of some of those originally voting for it as their representative. The existing certification must nevertheless be honored until lawfully rescinded." 195 F. 2d at 352.

Again, in *NLRB* v. *Toarmina*, 207 F. 2d 251 (C. A. 5, 1953), the court enforced an order requiring the employer to bargain collectively with a union despite the employer's challenge to the validity of the Board's action in dismissing

decertification proceedings initiated by its employees. The court said (pp. 254-255):

> "* * * When the Board has duly certified a Union, the employer may not thereafter decide for himself that the union has lost its bargaining status and refuse to deal with it further. See also *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702, 64 S. Ct. 817, 88 L. Ed. 1020; *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563, 70 S. Ct. 826, 828, 94 L. Ed. 1067. * * *
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> "* * * It is claimed that the evidence would show that a petition for decertification by a 'vast majority' of the employees was filed and subsequently dismissed by the Board several days before the rendition of its decision on July 27, 1951. However, this circumstance is without significance here as our decision in *NLRB* v. *Sanson Hosiery Mills, supra*, makes it clear that any controversy arising over the employees' petition for a change in their bargaining representative would be one between the bargaining agent and the employees and is wholly extraneous to the issue here presented, which is whether or not the respondents have unjustifiably refused to recognize and deal with the duly certified representative of the employees. This they have done."

The Court of Appeals for the Seventh Circuit has similarly adverted to this Court's decision in *Mexia* and to the absence of any standing in the employer to institute decertification proceedings, as establishing that an employer must honor a certification until revoked at the instance of his employees. *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783, 793-794 (C. A. 7, 1950), certiorari denied, 340 U. S. 930. See also *NLRB* v. *Arnolt Motor Co.*, 173 F. 2d 597, 599 (C. A. 7, 1949); *NLRB* v. *Norfolk Shipbuilding & D. Corp.*, 172 F. 2d 813 (C. A. 4, 1949).

IV. To be fair, simple and workable a system of certification and decertification requires that the employer unquestioningly bargain collectively with a certified union until the certificate is revoked.

Both the construction placed on the Act by the Board

and that urged by us would lead to the same result in the instant case. Under the Board's view, however, the employer's duty to bargain here rests on the Board's decision, in the exercise of its discretion, that the employees should not be permitted to change their minds for a reasonable period. Under our view, it rests on the existence of a certification which must be honored until a shift in employee sentiment is evidenced by another Board-conducted election providing the same safeguards for uncoerced choice that were provided in the first election.

In addition to placing the reason for the result on its proper ground, our view would lead to a much more sensible and much fairer administration of the Act. Enough history is available to permit the categorical statement that some employers will use every device to avoid the duty to bargain collectively which the Act imposes. Adoption of the Board's theory would mean that after a year or some other "reasonable period" had elapsed, an employer could refuse to bargain on the basis of a Gallup poll or some other expression of employee opinion which he regarded as sufficient to raise doubt as to the union's status, even though no employee had filed a decertification petition. In an unfair labor practice proceeding the Board would presumably have to determine whether the doubt was in good faith, whether the poll represented a fair method of ascertaining employee sentiment, and a host of similar questions.[10] Under our view, the obligations of all would be clear—as would be the proper method of obtaining an accurate poll of the employees' views.

Our view further makes sense of the decisions of the Board, cited by it on p. 23 of its brief, which recognize changes in employee sentiment where there has been no

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[10] "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case." *Matter of Celanese Corporation of America*, 95 NLRB 664, 673 (1951).

formal certification since, under our view, the question is not one of enforcing a reasonable period during which employees cannot change their minds but rather one relating to the appropriate method of revoking a formal certification. The cases cited by the Board in footnote 10 of its brief (p. 21) as showing the special circumstances justifying an exception to its "reasonable period" rule are not contrary to our view that the employer must continue to bargain with a certified union until it is decertified. In fact, those cases support our view. All but one are representation cases under Section 9(c) in which the Board, for the reasons stated in the footnote, ordered new secret ballot elections. In only one of the cases—*Henry Heide, Inc.*, 107 NLRB No. 258, 33 LRRM 1347 (February 18, 1954)—did an employer refuse to bargain because of a claim of "special circumstances." In that case the Board rejected the claim. It said:

> "* * * an employer who believes in good faith that unusual circumstances have arisen which require a redetermination of representatives may raise this issue by filing a petition with the Board. But until the Board has administratively decided that the circumstances warrant a formal investigation * * * the employer's duty to meet and confer in good faith with the union continued." 33 LRRM at 1349.

Although there are, so far as we know, no cases which permit an employer to ignore a Board certification because of "special circumstances" our view would not preclude such a result where the situation had so greatly changed as to deprive the certification of any real meaning. Such cases would include defunctness of the certified union or a schism such that the identity of the certified union was in doubt.

Our view, because it eliminates confusion and uncertainty in the great majority of cases, will lead to greater effectuation of the Act's basic purposes. So long as there is doubt as to how a given case will be decided in which an employer sets forth a claim of a shift in employee sentiment, recalcitrant employers will have nothing to lose by encouraging

the circulation of petitions and similar documents. Since these methods create no danger of a vote which can serve to fortify the union's position, they are devices favored by such employers. Whether or not the employers succeed in convincing the Board that they are within some exception to the one year rule or that the doubt of majority raised in their minds before or after the one year was genuine, the employees are in fact deprived of bargaining during the interim. The construction for which we contend, on the other hand, offers greater certainty, predictability, and simplicity and thus eliminates the delays which can themselves destroy collective bargaining.

Most importantly, the construction for which we contend preserves the sanctity of secret elections To allow such elections to be set aside by informal Gallup polls brings elections into disrepute and makes a mockery of the guarantees of the Act.

CONCLUSION

It is respectfully urged that for the reasons hereinabove set forth the judgment below should be affirmed on the ground that a Board certification after a secret ballot election requires the employer to bargain collectively with the union certified until that certificate is revoked under the procedures prescribed in the Act.

Respectfully submitted,

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